Supreme Court, U.S.
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No. 01-1812 JUN 7 2002

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In The Supreme Court of the United States

DENNIS J. KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in denying Petitioner's application for a certificate of appealability?

2. Was Petitioner denied his constitutional right to effective assistance of counsel at trial?

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OPINIONS BELOW

The opinion and orders of the district court denying the Petitioner's § 2255 motion and denying a certificate of appealability are set forth in the Appendix at A-3, -4, -6 to -8. The Court of Appeals' Order denying Petitioner's Application for a Certificate of Appealability is set forth in the Appendix at A-2. The Court of Appeals' Order denying Petitioner's Motion to Reconsider is set forth in the Appendix at A-1.

JURISDICTION

The order of the United States Court of Appeals for the Eleventh Circuit denying the certificate of appealability was entered on December 26, 2001, and its order denying petitioner's Motion to Reconsider, Vacate, and Modify its prior order was entered on March 12, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> **AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY**
>
> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution provides in pertinent part:

> **AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS**
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253 provides in pertinent part:

> **(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> . . . .
>
> **(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> . . . .
>
> **(B)** the final order in a proceeding under section 2255.
>
> **(2)** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Fed. R. Crim. P. 29 provides in pertinent part:

(a) **Motion before Submission to Jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) **Reservation of Decision on Motion.** The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

STATEMENT OF THE CASE

The Petitioner, Dennis J. Kelly, along with codefendants Jeanette Garrison, David Suba, Healthmaster, Inc., Master Plan, Inc., and Managed Risk Services, was charged by indictment in the Southern District of Georgia with numerous charges related to fraud. Petitioner was named in counts 1, 11-26, and 30-133 of the 133-count Redacted Indictment filed on July 26, 1995. In brief, count 1 charged Kelly with conspiracy to defraud the United States in violation of 18 U.S.C. § 371; in counts 11-26 and 30-32, Kelly was charged with making false statements to the government in violation of 18 U.S.C. § 1001; in counts 36-78 and 110-115, Kelly was charged with mail fraud in violation of 18 U.S.C. § 1341; counts 79-109, 12-23, 125-128, and 132 charged Kelly with money laundering in violation of 18 U.S.C. § 1956; in counts 116-121, Kelly was charged with embezzlement from an employee benefit plan in violation of 18 U.S.C. § 664; count 131 alleged bank fraud in violation of 18 U.S.C. § 1344; and count 133 of the Redacted Indictment was a criminal forfeiture count.

On July 26, 1995, Kelly appeared before the Honorable Anthony A. Alaimo, United States District Judge, Southern District of Georgia, for a jury trial; on July 29, 1995, Kelly was convicted by jury on the charges alleged, except as to counts 33-35, which charged obstruction of a federal audit, and counts 124, 129, and 130, which alleged violations of the federal money laundering statute. Pursuant to an agreement between Kelly and the government, Judge Alaimo ordered the forfeiture of assets totaling $934,856 and on July 30, 1995. On October 30, 1995, Kelly was sentenced to a term of 151 months' imprisonment.

Kelly timely appealed his convictions and sentences, and, on January 9, 1998, the United States Court of Appeals for the Eleventh Circuit affirmed Kelly's convictions except as to

counts 131 and 132, which were reversed and remanded for resentencing. *See United States v. Suba*, 132 F.3d 662, 677 (11th Cir. 1998).

On June 22, 1998, Kelly was resentenced to 97 months' imprisonment. Following the parties' cross-appeals to the Eleventh Circuit, Kelly's convictions were affirmed. *See United States v. Kelly*, No. 98-8925 (11th Cir. Dec. 15, 1999) (unpublished opinion). However, the Eleventh Circuit vacated Kelly's sentence, holding that the district court should have assessed an abuse of trust enhancement; the appellate court rejected Kelly's argument that the district court erred with respect to the grouping of the several counts under the Sentencing Guidelines. *See id.* On April 7, 2000, Kelly was once again sentenced to a term of 97 months' imprisonment.

Kelly filed a motion pursuant to 28 U.S.C. § 2255 in the Southern District of Georgia on January 28, 1999, Case No. CV199-010. Kelly's motion alleged several grounds for relief, including that trial counsel rendered constitutionally ineffective counsel based on several specific acts, as discussed below. On April 20, 1999, the court closed this civil action for statistical reporting purposes and directed the Clerk of Court to reopen the case following the Eleventh Circuit's review of the pending cross-appeal and the return of the record to this Court. The case was reopened on July 5, 2000; as noted, an evidentiary hearing was held on February 21, 2001. On April 30, 2001, a Magistrate Judge's Report and Recommendation found the stated grounds for relief in Kelly's § 2255 motion to be without merit and recommended that his motion be denied. By Order dated June 26, 2001, the District Court Judge, Anthony A. Alaimo, affirmed and adopted the Magistrate Judge's findings and conclusions and denied Kelly's § 2255 motion.

On September 10, 2001, the district court denied a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c).

On December 26, 2001, the United States Court of Appeals for the Eleventh Circuit denied Kelly's Application for Certificate of Appealability, and, on March 12, 2002, the Eleventh Circuit denied Kelly's Motion to Reconsider, Vacate, and Modify its prior order.

The underlying facts giving rise to the prosecution against Petitioner are complex and stem from the manner in which Petitioner and his codefendants administered self-insurance funds and dealt with reimbursements from Medicare. The evidence against Petitioner was not overwhelming, and he intended to testify and present other witnesses all of whom would testify, in effect, that Petitioner's conduct was reasonable and not fraudulent and that defense counsel never presented a defense. In her opening statement to the jury, defense counsel promised to present a complete defense and call employees from EBC to explain the work that was done on the health fund (Trial Testimony, Vol. 1, at 37-42). However, no defense was presented. After the government presented its case-in-chief and rested, defense counsel made a motion for judgment acquittal pursuant to Fed. R. Crim. P. 29. The district court reserved ruling on the motion. At that point, the defense rested without presenting any evidence. The district court ultimately denied the Rule 29 motion.

At the hearing held on the Petitioner's § 2255 motion, Petitioner's trial counsel testified that, in effect, she decided not to present a defense and advised Petitioner not to testify because she believed that to present a defense would jeopardize the Rule 29 motion (Motion Transcript at 138, 151 et seq. [hereinafter referred to as "M. Tr."]). Counsel was afraid that either through the defense witnesses or by rebuttal evidence the government would be able to present additional evidence to support its case, which would thereby jeopardize a favorable ruling on the Rule 29 motion.

Petitioner testified at the motion hearing that he, at all times, expressed his desire to testify and present other witnesses in his defense (M. Tr. at 62 et seq.). Petitioner fully expected to testify and was surprised when counsel advised him not to testify (M. Tr. at 66-68, 78). Counsel told him the district court would grant the Rule 29 motion (M. Tr. at 66-68).

Petitioner also testified that he told defense counsel about several witnesses, including expert witnesses, who were willing and available to testify in his behalf, and informed counsel of the substance of their offered testimony, but counsel failed to ever interview many of these witnesses (M. Tr. at 62-65).

ARGUMENT

I. PETITIONER WAS ENTITLED TO A CERTIFICATE OF APPEALABILITY.

The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1) to review, on a petition for writ of certiorari, a denial of an application for certificate of appealability under the Antiterrorism and Effective Death Penalty Act (AEDPA) by a circuit judge or a panel of the Court of Appeals. *Hohn v. United States*, 524 U.S. 236 (1998).

Under 28 U.S.C. § 2253(c), a certificate of appealability ("COA") may issue only upon the "substantial showing of the denial of a constitutional right." This includes a showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is as follows: "The petitioner must demonstrate that reasonable jurists would find

the district court's assessment of the constitutional claim debatable or wrong." *Slack v. McDaniel*, 529 U.S. at 484.

This standard has been met in this case. Petitioner has raised specific and serious claims pertaining to counsel's ineffectiveness and has presented evidence to support them. Under circumstances similar to those at issue here, other federal courts have found ineffective assistance. While each case must be decided on its facts, in light of the facts and circumstances presented in this case as discussed in the following argument, Petitioner has demonstrated that reasonable jurists would find the district court's assessment of the constitutional claim (ineffective assistance) debatable or wrong.

By denying a certificate of appealability in this case, the court of appeals has decided this important federal question in a way that conflicts with relevant decisions of the Court and other lower federal courts. In addition, the substantive ineffective assistance claims raise important issues that should be addressed on appeal and, eventually, by this Court. Therefore, an acceptance of this petition would afford the Court an opportunity to address important and current federal statutory and constitutional questions, as well as insure that justice is served in this case.

II. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

The Sixth Amendment provides that "[in] all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This Court has emphasized the importance of this right:

> That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command.

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

Strickland v. Washington, 466 U.S. 668, 685 (1984). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) (quoting Walter Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956)). Moreover, the right to counsel is the right to effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 395-96 (1985).

To prevail upon a claim of ineffective assistance of counsel, Petitioner must satisfy a two-prong test. Petitioner must show (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) that the deficiency actually prejudiced the defense. *Strickland v. Washington*. Under *Strickland*, the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. 466 U.S. at 688. This requires the petitioner to demonstrate that the specific acts and/or omissions on the part of defense counsel were outside the wide range of professionally competent assistance in light of all the circumstances. *Id.* at 690. The court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered trial strategy. *Id.* at 689. In analyzing the issue of reasonableness, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690.

The prejudice prong requires the petitioner to demonstrate a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*. A verdict only weakly supported by the record is more likely to have been affected by counsel's errors than one with strong support. *Id.* Prejudice is shown when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. "The result of a proceeding can be rendered unreliable and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. "Reasonable probability under the foregoing standard is defined as "probability sufficient to undermine confidence in the outcome." *Id.* In addressing this issue the court should consider the totality of the evidence. *Id.* at 695.

In weighing counsel's errors, the court may consider their cumulative effect in light of the totality of the circumstances. *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984), *cert. denied*, 469 U.S. 1226 (1985); *Washington v. Smith*, 48 F. Supp. 2d 1149 (E.D. Wis. 1999), *aff'd*, 219 F.3d 620 (7th Cir. 2000). Even if individual acts or omissions are not so grievous as to merit a finding of prejudice, their cumulative effect may be substantial enough to meet the *Strickland* test. *Crisp v. Duckworth; Washington v. Smith.*

While petitioner's ineffective assistance claim encompasses many acts and omissions by counsel, it has five main components: (1) the failure to produce evidence that was promised in the opening statement; (2) the erroneous legal conclusion that by putting on a defense, defendant jeopardized a favorable ruling on his Rule 29 motion for acquittal made at the close of the government's case-in-chief; (3) the failure to properly advise petitioner concerning the petitioner's decision to testify, thus preventing petitioner from

testifying despite his professed desire to do so; (4) the failure to investigate and interview witnesses, including expert witnesses, who could have provided exculpatory evidence; and (5) the cumulative effect of counsel's errors resulted in ineffective assistance of counsel.

A. Counsel's Failure To Fulfill Promises Made In Her Opening Statement Constituted Ineffective Assistance.

Defense counsel promised in her opening statement at trial to present a complete defense and to call witnesses to explain Petitioner's conduct. Counsel, however, did not call any witnesses and advised Petitioner not to testify. The failure of counsel to fulfill the promises she made in her opening statement constitutes ineffective assistance.

It has been recognized that "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988); *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 14 (1st Cir. 1997); *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990); *McAleese v. Mazuriewicz*, 1 F.3d 159 (3d Cir. 1993); *Ouber v. Guarino*, 158 F. Supp. 2d 135, 152 (D. Mass. 2001); *Washington v. Smith*, 48 F. Supp. 2d at 1164–65. In *Anderson v. Butler*, defense counsel, in his opening statement, told the jury that he would call a psychiatrist and a psychologist to show that the defendant had no appreciation of what he had done. Counsel subsequently rested his case without calling the promised doctors, although they were available. On appeal, the court held that the failure to call these witnesses amounted to ineffective assistance of counsel explaining:

> The first thing that the ultimately disappointed jurors would believe, in the absence of some other explanation, would be that the doctors

were unwilling, viz., unable, to live up to their billing. This they would not forget.

858 F.2d at 17.

> [T]he jurors' conclusion would remain that impartial experts—the most qualified witnesses—would not testify as counsel had said they would; in effect a contradiction of the favorable lay witnesses, much worse than if he had not mentioned the doctors initially.

Id. Furthermore,

> to promise even a condensed recital of such powerful evidence, and then not produce it, could not be disregarded as harmless. We find it prejudicial as matter of law.

Id. at 19. Moreover, the court found that even if circumstances occurring after the opening statement made it reasonable at that point not to call the doctors as witnesses, counsel nevertheless was constitutionally ineffective in promising to call them.

> We cannot accept the approach that we should consider each matter separately—weighing counsel's choice on the second day as if there had been no opening. There was thrown into the scales the heavy inference the jurors would draw from the non-appearance of the doctors. In those circumstances it was a very bad decision, or, if it was still wise because of the damaging collateral evidence, it was inexcusable to have given the matter so little thought at the outset as to have made the opening promise.

Id. at 18; *see Ouber v. Guarino* (trial counsel's failure to follow through on his promise in his opening statement that the petitioner would testify, constituted ineffective assistance of counsel; in such a case, prejudice must be presumed; case discussed more fully *infra*); *see also United States v. Gonzalez-Maldonado,* 115 F.3d at 15 (concluding that a defendant suffered prejudice as a matter of law where his counsel did not produce important evidence promised in counsel's opening, even where counsel had been prevented by a ruling of the trial judge from presenting the promised evidence); *Strickland v. Washington,* 456 U.S. at 692 (in certain situations prejudice may be presumed). Other courts have similarly found that the failure to produce evidence which was promised to the jury in counsel's opening statement may constitute ineffective assistance although such failure is not prejudicial as a matter of law. *See, e.g., Harris v. Reed; McAleese v. Mazuriewicz; Washington v. Smith.*

In this case, defense counsel made bold promises in her opening statement. She stated that she would present a complete defense to the charges and would call employees of EBC to explain all the work they did with regard to the health fund (Trial Testimony, Vol. 1, p. 42). Counsel's theory of defense never changed but she failed to call any witnesses and rested without presenting any evidence on defense. While she did introduce various documents and cross-examined some employees during the government's case, such conduct hardly fulfills her promises made in the opening statement and cannot justify the failure to call any witnesses (including expert witnesses) on defense.

That such failure to fulfill the promises made in the opening statement fell below an objective standard of reasonableness and prejudiced Petitioner is further supported by counsel's advice to Petitioner about whether to testify, counsel's erroneous legal conclusion that presenting evidence would jeopardize the Rule 29 motion for acquittal made at the

close of the government's case-in-chief, and counsel's failure to investigate; and these additional deficiencies in performance exacerbated the prejudice caused by counsel's unfulfilled promises. Therefore, counsel's failure to fulfill her promises constitutes ineffective assistance of counsel.

B. Counsel's Erroneous Legal View Of Rule 29 Constituted Ineffective Assistance.

At the close of the government's case-in-chief, defense counsel made a motion for judgment of acquittal and the district court reserved its ruling on the motion. At that point, defense counsel rested without presenting any evidence. Counsel's decision to rest without presenting evidence was based on her erroneous view of Rule 29 and constituted ineffective assistance.

Fed. R. Crim. P. 29 was amended in 1994, and the amended version was applicable at Petitioner's trial in 1995. The amended version of Rule 29 provides, in pertinent part, as follows:

> (b) **Reservation of Decision on Motion.** The Court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. *If the Court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.*

(Emphasis added.)

The Advisory Committee notes to the amended version of Rule 29 state:

> Reserving a ruling on a motion made at the end of the government's case does pose problems, however, where the defense decides to present evidence and run the risk that such evidence will support the government's case. To address that problem, the amendment provides that the Trial Court is to consider only the evidence submitted at the time of the motion in making its ruling, whenever made. And in reviewing a trial court's ruling, *the appellate court would be similarly limited.*

(Emphasis added.)

In *Carlisle v. United States*, 517 U.S. 416, 436, 445 n.5 (1996) (Stevens, J., joined by Kennedy, J., dissenting), the dissent notes:

> [T]he new Rule 29(b) makes clear that the district court, even if it reserves a motion for acquittal filed after the prosecution's case in chief, *may not consider any evidence submitted thereafter* in disposing of the motion. That limitation on the district court's authority *protects a defendant's right to make a motion for acquittal and to put on rebuttal evidence without risking that new evidence of guilt will emerge.*

(Emphasis added.)

The prior version of Rule 29 did not permit the trial court to reserve its ruling on the defendant's Rule 29 motion at the close of the government's case. *United States v. Thomas*, 987 F.2d 697 (11th Cir. 1994). And, under the prior version of

the Rule, the defendant's decision to present evidence in his behalf operated as a waiver of his objection to the denial of his motion made at the close of the government's case. *Id.* Defense counsel, however, was apparently unaware of this change made by the amendment to Rule 29.

The record indicates that counsel's advice to Petitioner not to testify and her decision not to present a defense was based on her erroneous legal conclusion that Rule 29 required a choice: not present a defense in order to preserve the argument that the government's case-in-chief was insufficient to convict the defendant or waive such argument and present a defense and thereby run the risk of presenting evidence in support of the prosecution. And counsel assured the Petitioner that the Rule 29 motion would be granted. Of course, the district court ultimately did not grant the motion, and the Petitioner lost his opportunity to present a defense and testify.

Clearly, counsel's conduct based on her erroneous view of Rule 29 was deficient under the *Strickland* test. A legal decision based on a legal misunderstanding is not animated by "strategic calculation." *See Williams v. Taylor*, 529 U.S. 362, 395 (2000). Likewise, a decision based on ignorance of relevant facts and "mistaken beliefs" is not based on "strategic considerations." *Kimmelman v. Morrison*, 477 U.S. at 368. Thus, such decisions are not entitled to the deference usually afforded strategic decisions by counsel. *See Pauel v. Hollins*, 261 F.3d 210 (2d Cir. 2001). Counsel's decision not to present a defense was based on her mistaken view of Rule 29 rather than a reasonable strategic decision since her Rule 29 motion would not have been jeopardized by presenting a defense. Thus, counsel's legal misunderstanding constituted deficient performance. *See Glover v. Miro*, 262 F.3d 268 (4th Cir. 2001) (first prong of *Strickland* met where defense counsel did not realize that state statute allowed criminal defendants to compel the attendance of out-of-state witnesses necessary for

the defense and did not realize that the sentence for the offense at issue had been amended from a maximum sentence of life in prison to a maximum sentence of 30 years).

Just as clearly, this deficient performance prejudiced Petitioner by preventing him from testifying and presenting evidence in his defense. This was a close case and any evidence in defense could have made the difference and resulted in an acquittal. And the record shows that there were witnesses, including expert witnesses, prepared to testify on behalf of Petitioner. *See Pauel v. Hollins* (counsel's failure to prepare a defense because he was confident that, at the close of the prosecution's presentation of its evidence, the trial judge would grant defendant's motion to dismiss constituted ineffective assistance of counsel).

Therefore, counsel's performance in this regard constituted ineffective assistance.

C. Counsel's Advice To Petitioner Not To Testify Constituted Ineffective Assistance.

At the habeas hearing, Petitioner testified that he, at all times, indicated to counsel his desire to testify. However, following the government's presentation of its case-in-chief and defense counsel's Rule 29 motion for judgment of acquittal on which the district court reserved ruling, counsel advised Petitioner not to testify. Counsel told Petitioner that the district court would grant the Rule 29 motion and that, if Petitioner testified, he risked not receiving a favorable ruling on the motion because further evidence could be presented to support the government's case by way of defense witnesses and rebuttal by the government. This advice not to testify constituted ineffective assistance of counsel.

It is well established that a criminal defendant has the right to take the stand and testify in his own defense. *See Rock*

v. Arkansas, 483 U.S. 44 (1987); *United States v. Martinez*, 181 F.3d 627 (5th Cir. 1999). Only the defendant, and not counsel, may waive this right. *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998). A waiver of this right must be knowing and voluntary. *Id.* A trial counsel's duty of effective assistance includes the responsibility to advise the defendant concerning the exercise of this constitutional right. *Rega v. United States*, 263 F.3d 18 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 847 (2002). Obviously, the decision whether a criminal defendant should take the witness stand in his own trial unquestionably has tremendous strategic importance. *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1990), *cert. denied*, 506 U.S. 482 (1992). Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, of the strategic limitations of each choice, and that it is ultimately for the defendant himself to decide. 953 F.2d at 1533. "This advice is crucial" because there can be no effective waiver of a fundamental constitutional right unless there is an intentional relinquishment or abandonment of a known right or privilege. *Id.* The defendant can then make the choice of whether to take the stand "with the advice of competent counsel." *Id.*

In this case, counsel's advice to Petitioner not to testify was based on her misunderstanding of Rule 29 and was unreasonable. In rejecting Petitioner's contention, the district court erroneously focused on Petitioner's role in the strategic decisions of his defense and his intelligence rather than on defense counsel's deficient performance. A similar situation was presented in *Ouber v. Guarino*, where the petitioner's ineffective assistance claim was based on the argument that, although trial counsel had promised in his opening statement that petitioner would testify, counsel later advised her not to testify, which advice petitioner followed and which advice, under the circumstances, petitioner claimed constituted ineffective assistance. The state court rejected this claim, finding that the petitioner had had the experience of two prior

trials and was competent and sophisticated enough to evaluate the risks and benefits of testifying at trial.

In rejecting such analysis and granting the habeas petition, the district court observed that the principal flaw in such analysis was that it focused not on the role of trial counsel in the determination that the petitioner should not testify, but on the role of petitioner herself. 158 F. Supp. 2d at 151. The district court stated that the state court focused so much of its attention on the competence of petitioner to make an evaluation of the risks and benefits of testifying that the court failed fully to take account of all the circumstances pertinent to an assessment of trial counsel's role as the professional representing the petitioner at trial. *Id.* at 149. As the district court observed:

> The petitioner and Trial Counsel were not professional equals—each fully capable of determining the best course for the petitioner's defense. The analysis of the Appeals Court, however, treats the two as though they were equals—or at least nearly so. In so doing, the Appeals Court was diverted from evaluating the totality of Trial Counsel's conduct in the circumstances, or as the First Circuit has put it, "the totality of the opening and the failure to follow through." *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988).

Id. The district court concluded that, under all the circumstances, trial counsel's advice to petitioner not to testify after he had promised the jury that she would was unreasonable, and such advice prejudiced the petitioner. Therefore, the advice constituted ineffective assistance requiring the grant of the habeas petition.

So, too, in this case, regardless of Petitioner's sophistication, he relied on the advice of his attorney regarding the decision to testify, and such advice clearly was based on an unreasonable mistake of law and thus was deficient. This advice also clearly prejudiced the Petitioner by preventing him from testifying and presenting a defense. Therefore, counsel's advice constituted ineffective assistance of counsel.

D. Counsel's Failure To Investigate And Interview Witnesses Constituted Ineffective Assistance.

The record shows that the Petitioner informed his counsel of numerous witnesses, including expert witnesses, who were prepared to offer testimony in his behalf, and what that testimony would consist of, but counsel failed to even interview many of them. Counsel also, obviously, failed to research the law regarding the amendments to Rule 29. Such failures constituted ineffective assistance of counsel.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland v. Washington; Gilbert v. Moore*, 134 F.3d 642 (4th Cir.), *cert. denied*, 525 U.S. 840 (1998); *Troedel v. Wainwright*, 667 F. Supp. 1456 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1987). Although the scope of the required investigation depends upon the number of issues and their complexity, the strength of the government's case, and the overall strategy of trial counsel, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985); *Martin v. Maggio*, 711 F.2d 1273 (5th Cir. 1983); *Troedel v. Wainwright*. Counsel must ordinarily investigate possible methods for impeaching prosecution witnesses and, in some instances, failure to do so may suffice to prove a claim under *Strickland*.

Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir.), *cert. denied*, 525 U.S. 981 (1998). The courts have held an attorney's representation deficient when he failed to contact and interview important prospective witnesses, especially when they were readily available or had been identified by the defendant prior to trial. *Id.* at 580.

As discussed in *Jones v. Jones*, 988 F. Supp. 1000, 1002 (E.D. La. 1997), *rev'd on other grounds*, 163 F.3d 285 (5th Cir. 1998), pretrial investigation is essential to the effective assistance of counsel. A lawyer must engage in a reasonable amount of pretrial investigation and, at a minimum, interview potential witnesses and make an independent investigation of the facts and circumstances of the case. *Id.* at 1002. The necessity for investigation increases with the seriousness of the offense and the gravity of the punishment. *Id.* Ineffectiveness is clear if the attorney fails to investigate a plausible line of defense or to interview available witnesses. *Id.* These can hardly be considered strategic choices since counsel by his failure has not obtained the facts upon which such a tactical decision could be reasonably made. *Id.*; *see Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998) (a "strategic" decision cannot be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them); *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (decision not to call witnesses because of a perceived weakness in the prosecution's case is unreasonable conduct).

Counsel's failure to interview the witnesses provided by Petitioner cannot be considered reasonable. This was a close case and any favorable evidence presented on defense could have made a difference. *See Nealy v. Cabana* (failure of defense counsel to adequately investigate and to contact witnesses who would have corroborated defendant's testimony and undermined the credibility of the government's witnesses was ineffective assistance and required reversal, where credibility of witnesses was the key issue and missing

testimony might have affected jury's appraisal of truthfulness of state's witnesses; counsel's failures could not be deemed trial strategy); *United States ex rel. Williams v. Washington*, 863 F. Supp. 697, 704 (N.D. Ill. 1994) (failure to call witnesses, coupled with a failure to interview witnesses because of the perceived weakness of the prosecution's case constituted ineffective assistance of counsel; counsel cannot be permitted to "tempt the fates" with such conduct), *aff'd*, 59 F.3d 673 (7th Cir. 1995) (for purposes of determining whether a criminal defendant received effective assistance of counsel, the testimony of neutral, disinterested witnesses is exceedingly important in a credibility contest).

Therefore, defense counsel's failure to properly investigate and interview witnesses constituted ineffective assistance of counsel.

E. The Cumulative Effect Of Counsel's Errors Resulted In Ineffective Assistance Of Counsel.

In light of the number and seriousness of counsel's errors and the closeness of the case against Petitioner, the cumulative effect of counsel's deficient performance was to prejudice the Petitioner. *See Halton v. Hesson*, 803 F. Supp. 1272, 1278 (M.D. Tenn. 1992) (considering the totality of counsel's errors during trial, the court found that counsel rendered ineffective assistance requiring reversal of the conviction; counsel's failures to interview witnesses, to develop alibi testimony, and to call a certain expert witness "all combine to 'render[] the result [of the trial] unreliable'").

Therefore, Petitioner was denied effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Honorable Court to grant this petition and issue a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

Dennis J. Kelly
715 Somerset Way
Augusta, Georgia 30909
(706) 738-9224

Counsel for Petitioner

No. _____

In The Supreme Court of the United States

DENNIS J. KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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Petitioner, pro se

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FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
MAR 12 2002
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14227-I

DENNIS J. KELLY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Georgia

Before **BLACK and MARCUS, Circuit Judges.**

BY THE COURT:

Upon reconsideration of this Court's order dated December 26, 2001, appellant's motion for a certificate of appealability is DENIED for failure to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000).

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
DEC 26 2001
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14227-I

DENNIS J. KELLY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Georgia

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DENNIS J. KELLY *

CIVIL NO. 199-10
VS. * CRIMINAL NO. 195-11

UNITED STATES OF AMERICA *

ORDER

The Appellant's motion for a certificate of appealability having been DENIED by the United States Court of Appeals,

IT IS HEREBY ORDERED that the order of the Eleventh Circuit Court of Appeals is made the order of this Court. The Clerk is instructed to return any exhibits in his possession to the appropriate counsel.

This 31st day of January, 2002.

/s/ Anthony A. Alaimo
ANTHONY A. ALAIMO
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DENNIS J. KELLY, Petitioner,	)	
v.	)	CIVIL ACTION NO. CV199-010
UNITED STATES OF AMERICA,	)	(Case No.: CR195-011)

CERTIFICATION OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), an appeal may not be taken in this matter unless the Court issues a Certificate of Appealability. This certificate may issue only if Petitioner has made a substantial showing of the denial of a constitutional right. If granted, the certificate must indicate which specific issue or issues satisfy this showing. In accordance with the foregoing, a Certificate of Appealability is hereby **DENIED** as Petitioner has not made a substantial showing of the denial of a constitutional right.

SO ORDERED, this 10 day of September 2001.

/s/ Anthony A. Alaimo

ANTHONY A. ALAIMO
JUDGE, UNITED STATES DISTRICT COURT

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In the United States District Court for the Southern District of Georgia Augusta Division

DENNIS J. KELLY,	:	CIVIL ACTION
	:	
Petitioner,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,		
	:	
Respondent.	:	NO. CV199-010

ORDER

Petitioner, Dennis J. Kelly ("Kelly"), filed the above-captioned case pursuant to 28 U.S.C. § 2255, seeking to vacate, set aside, or correct his sentence. On February 21, 2001, United States Magistrate Judge W. Leon Barfield conducted an evidentiary hearing on the grounds raised in Kelly's postconviction motion. On April 30, 2001, Magistrate Judge Barfield entered his Report and Recommendation finding that the stated grounds for relief in Kelly's motion to vacate, set aside, or correct his sentence are without merit. Magistrate Judge Barfield's finding of facts and recommendation was to deny Kelly's motion.

Kelly objected to the Report and Recommendation of the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1). Under that statute, "the Court shall make a *de novo* determination of

those portions of the report or specified proposed findings to which objection is timely made." *Id.* The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.*

The Court, having carefully considered the Petitioner's objections to the Report and Recommendation, and the findings of the Magistrate Judge, affirms and adopts the Magistrate Judge's findings and conclusions.[1] Accordingly, Petitioner's Motion is **DENIED.**

SO ORDERED, this 22 day of June, 2001.

/s/ Anthony A. Alaimo
JUDGE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[1]Compare *Jordan v. Hargett*, 34 F.3d 310 (5th Cir. 1994).

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United States District Court
Southern District of Georgia

DENNIS J. KELLY

JUDGMENT IN A CIVIL CASE

v. CASE NUMBER: CV199-10

UNITED STATES OF AMERICA

☐**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒**Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that in accordance with the Order of the Court entered June 26, 2001, adopting the Report and Recommendation of the Magistrate Judge and denying the motion to vacate, set aside, or correct the sentence, claims of the Petitioner, DENNIS J. KELLY, against the Respondent, UNITED STATES OF AMERICA, are hereby denied.

E.O.D.
6-26-01
DATE
/s/ stt
INITIALS

June 26, 2001
Date

Henry R. Crumley, Jr.
Clerk

/s/ Sherry Taylor
(By) Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DENNIS J. KELLY,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 199-10
	)	(FORMERLY CR 195-11)
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Dennis J. Kelly ("Kelly") filed the above-captioned case pursuant to 28 U.S.C. § 2255, and now before the Court is Kelly's motion to vacate, set aside, or correct his sentence. On February 21,2001, the Court conducted an evidentiary hearing on the grounds raised in Kelly's postconviction motion.[1] Now, for the reasons stated more fully below, the Court **HEREBY REPORTS** and **RECOMMENDS**

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[1]Kelly submitted a supplemental memorandum in support of his motion on March 13,2001, and the government thereafter filed its memorandum in response on March 20, 2001.

that Kelly's motion be **DENIED**, that this civil action be **CLOSED**, and that a final judgment be **ENTERED** in favor of the United States of America ("the government").

I. FACTS

On March 8, 1995, a grand jury in the Southern District of Georgia returned a 133-count indictment against Kelly and codefendants Jeanette Garrison ("Garrison"), David Suba ("Suba"), Healthmaster, Inc. ("Healthmaster"), Master Plan, Inc., and Managed Risk Services. Kelly was named in counts 1, 11-26, and 30-133 of the Redacted Indictment filed on July 26, 1995. In brief, count one charged Kelly with conspiracy to defraud the United States in violation of 18 U.S.C. § 371; in counts 11-26 and 30-32, Kelly was charged with making false statements to the government in violation of 18 U.S.C. § 1001; in counts 36-78 and 110-115, Kelly was charged with mail fraud in violation of 18 U.S.C. § 1341; counts 79-109, 12-23, 125-128, and 132 charged Kelly with money laundering in violation of 18 U.S.C. § 1956; in counts 116-121, Kelly was charged with embezzlement from an employee benefit plan in violation of 18 U.S.C. § 664; count 131 alleged bank fraud in violation of 18 U.S.C. § 1344; and finally, count 133 of the Redacted Indictment was a criminal forfeiture count.

On July 26, 1995, Kelly appeared before the Honorable Anthony A. Alaimo, United States District Judge, Southern District of Georgia, for a jury trial; on July 29, 1995, Kelly was convicted by jury on the charges alleged, except as to counts 33-35, which charged obstruction of a federal audit, and counts 124, 129, and 130, which alleged violations of the federal money laundering statute. Pursuant to an agreement between Kelly and the government, Judge Alaimo ordered the forfeiture of assets totaling $934,856 on July 30, 1995. On October 30, 1995, Kelly was sentenced to a term of 151 months imprisonment.

Kelly timely appealed his convictions and sentences, and, on January 9, 1998, the United States Court of Appeals for the Eleventh Circuit affirmed Kelly's convictions except as to counts 131 and 132, which were reversed and remanded for resentencing.[2] *See United States v. Suba*, 132 F.3d 662, 677 (11th Cir. 1998). The Eleventh Circuit concisely summarized the facts on which Kelly's convictions are based:

> The underlying facts of this case are complex and have been reconstructed from numerous and sometimes tedious paper trails throughout the record. At first, the scheme appears sophisticated. In fact, however, it is really quite simple. Home health care agencies are licensed by Medicare. Medicare is administered by the United States Department of Health and Human Services (HHS). HHS contracts with insurance companies (fiscal intermediaries) to distribute Medicare funds. The fiscal intermediary pays the Medicare funding to providers of medical care, in this case, home health care agencies. Medicare covers the reasonable cost of direct patient care and reasonable and necessary overhead expenses. Appellants allegedly established certain overhead expenses, appearing genuine, but in fact, neither reasonable or necessary. These expenses were reimbursed by Medicare. The reimbursed funds allegedly found their way into Appellants' pockets.

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[2]Counts 131 and 132 alleged bank fraud and money laundering. *See United States v. Suba*, 132 F.3d 662, 671 n.18. (11th Cir. 1998).

Id. at 665-66 (footnotes omitted). On June 22, 1998, Kelly was resentenced to 97 months imprisonment. Following the parties' cross-appeals to the Eleventh Circuit, Kelly's convictions were affirmed. *See United States v. Kelly*, No. 98-8925, (11th Cir. Dec. 15, 1999) (unpublished opinion). However, the Eleventh Circuit vacated Kelly's sentence, holding that the District Court should have assessed an abuse of trust enhancement; the appellate court rejected Kelly's argument that the District Court erred with respect to the grouping of the several counts under the Sentencing Guidelines. *See Id.* On April 7, 2000, Kelly was once again sentenced to a term of 97 months imprisonment.

Kelly filed his § 2255 motion in this Court on January 28, 1999. Kelly's motion alleged the following four grounds for relief: (1) trial counsel rendered constitutionally ineffective assistance by prohibiting Kelly from testifying in his own behalf; (2) trial counsel's failure to investigate, interview or call corroborating witnesses, failure to develop mitigating evidence, and failure to call character witnesses demonstrate constitutionally ineffective assistance of counsel; (3) appellate counsel "abandoned" Kelly immediately after the Eleventh Circuit issued its January 9, 1998 decision, thus rendering constitutionally inadequate assistance, and (4) an intervening change of law (*United States v. Bajakajian*, 524 U.S. 321 (1998)), warrants reconsideration of the forfeiture issue.[3] On April 20,

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[3]During the course of this postconviction proceeding, both parties have submitted multiple affidavits and other exhibits in support of their respective arguments. On October 11, 2000, the Court notified the parties that it would consider the supplemental documents submitted by both parties when it took Kelly's motion under advisement. *See* Rule 7, Rules Governing Section 2255 Proceedings for the United States District Courts (permitting the Court to expand the record to include materials relevant to the determination of the merits

1999, the Court closed this civil action for statistical reporting purposes and directed the Clerk of Court to reopen the case following the Eleventh Circuit's review of the pending cross-appeal and the return of the record to this Court. The case was reopened on July 5, 2000; as noted, an evidentiary hearing was held on February 21, 2001.[4] Both parties have filed supplemental memoranda outlining their respective positions, and Kelly's § 2255 motion is now ripe for consideration.

II. DISCUSSION

A. Kelly's Right to Testify

Arguing that trial counsel rendered constitutionally ineffective assistance, Kelly contends that "trial counsel denied him the right to testify in his own behalf." § 2255 Motion, p. 11. As both parties recognize, a defendant's right to testify is personal to the defendant and cannot be waived by trial counsel. *See Nichols v. Butler*, 953 F.2d 1550, 1552 (11th Cir. 1992) (en banc). The record before the Court belies any

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of the motion). No party has disputed the legitimacy of the affidavits and other exhibits now part of the expanded record. Much of the testimony put into the record at the February 21st evidentiary hearing echoed what had previously been put before the Court in the witness' affidavits, and the Court refers to both the affidavits and the witness testimony in this Report and Recommendation. The "affidavits" of Jones and Widener are actually declarations made under penalty of perjury; as they are in substantial compliance with the requirements set forth in 28 U.S.C. § 1746, the Court treats those declarations as affidavits.

[4]"Tr. -" herein refers to the transcript of the February 21st evidentiary hearing.

suggestion that Kelly's trial counsel "denied" Kelly his right to testify.

To establish ineffective assistance of counsel, Kelly first must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In applying this test, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance[.]" *Id.* at 689; *see also Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (emphasizing "that petitioner was not entitled to error-free representation"). Second, Kelly must establish prejudice by showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

In applying the Strickland components outlined above, "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Smith v. Wainwright*, 777 F.2d 609, 616 (11th Cir. 1985) (quoting *Strickland*, 466 U.S. at 697), *cert. denied*, 477 U.S. 905 (1986). Under the prejudice component, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome . . . ." *Smith*, 777 F.2d at 616 (quoting *Strickland*, 466 U.S. at 694-95). Notably, prejudice cannot be shown when counsel fails to raise an issue that has no merit, *see United States v. Costa*, 691 F.2d 1358, 1363 (11th Cir. 1982) (per curiam), and "[c]onclusory allegations of ineffective assistance are insufficient" to prevail on a Sixth Amendment ineffective assistance of counsel claim. *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992) (per curiam) (citation

omitted). In short, this Court's determination of whether or not Kelly suffered prejudice under the ineffective assistance of counsel test set forth in *Strickland* hinges upon the validity of Kelly's underlying claims. *See Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir.), *cert. denied*, 498 U.S. 849 (1990).

At the February 21, 2001 evidentiary hearing, lead counsel Celeste T. Jones ("Jones") of the McNair Law Firm testified that she was assisted in her defense of Kelly's criminal charges by co-counsel and local counsel of record Bill Lumpkin ("Lumpkin") and co-counsel Robert L. Widener ("Widener") of the McNair Law Firm; investigator Jim Calhoun and paralegal Kevin Werner, both of the McNair Law Firm; and Lumpkin's investigator, Jesse New. Tr. 99-100. Jones testified that she discussed Kelly's right to testify on at least four occasions; Jones informed Kelly "that it was his decision and his alone. It was his absolute right to decide to testify or not to testify." Tr. 129. According to Jones, Kelly expressed concerns over potentially damaging information in the government's (investigative) 302 Reports, such as his alleged relationship with a female auditor, forgeries to which the defense ultimately stipulated, and Kelly's payments to a prostitute who, in turn, entertained government auditors. Tr. 130-31. In short, Jones stated that Kelly's testimony at trial may have placed unfavorable evidence before the Court and jury, and that Kelly was fully aware of that possibility. Additionally, Jones discussed with Kelly the likelihood that his testimony, if ultimately discredited by the sentencing judge, would have resulted in a sentencing enhancement for obstruction of justice. Tr. 154-55; *see also* U.S.S.G. § 3C1.1.

Jones testified that Kelly made the final decision not to testify during the break immediately before the government rested its case. Tr. 131. Jones' unwavering assertion that Kelly made the ultimate decision whether or not to testify is well supported by other evidence of record. For instance, Widener testified that he overheard a conversation between Jones and

Kelly that occurred during the first or second night of the trial; during that conversation, Kelly stated his reluctance to take the stand, at which point Jones indicated that she and Kelly needed to discuss the implications of that decision. Tr. 162-63. Based on what he overheard, it was Widener's impression that Jones and Kelly had previously discussed the advantages and drawbacks of Kelly testifying at trial. Tr. 163. Additionally, the fact that Kelly retained Jones and Widener for his appeal undermines Kelly's assertion in this proceeding that trial counsel somehow denied him his right to testify in defense of the criminal charges. Indeed, the record contains correspondence from Kelly to Jones and Widener dated August 1996, October 1996, and May 1997; the cited letters all express Kelly's satisfaction with the defense put forth by Jones and Widener.[5] Simply put, Kelly is a sophisticated and well-educated individual who, by all accounts, was actively involved in the defense of the criminal charges;[6] yet, Kelly

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[5]"I want to thank you both for the wonderful job you did on the appeal." August 9, 1996 Letter. "I want to thank you both for the wonderful job you did on the appeal briefs." October 28, 1996 Letter. "You've done a wonderful job!" May 13, 1997 Letter. The letters are attached as exhibits to Jones' affidavit. *See* Jones Aff., Ex. D. Again, the parties were put on notice before the evidentiary hearing that the Court reserved the possibility of referencing the expanded record once Kelly's motion was taken under advisement. In passing, the Court notes that Kelly's supplemental memorandum also cites to the correspondence between himself and appellate counsel in support of his ineffective assistance of counsel allegations. *See* Pet.'s Supp. Mem., App., p. 40.

[6]The Presentence Investigation Report ("PSI") states that Kelly's annual salary as chief financial officer of Healthmaster from 1985 until March 1995 was approximately $250,000. Kelly's correspondence to Jones and Widener

sought the assistance of Jones and Widener for the appeal of his convictions and sentences. Tr. 74-77. Kelly's assertion that trial counsel denied him his constitutional right to testify is belied by the record evidence; by the same token, Kelly's suggestion that he was unaware of his absolute right to testify in the event he chose to do so is incredulous given Kelly's acumen and involvement in the defense of the government's charges.

In sum, the evidence shows that Kelly was informed of his right to testify, and that he made the ultimate decision not to testify following multiple discussions between himself and trial counsel concerning the benefits and disadvantages of Kelly's testimony. In other words, Kelly has not demonstrated that trial "counsel's representation fell below an objective standard of reasonableness"; as Kelly has not met his burden on the performance prong of the *Strickland* inquiry, the first ground of Kelly's federal habeas corpus petition is without merit.[7] *Strickland*, 466 U.S. at 688.

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following Kelly's incarceration as well as his testimony at the evidentiary hearing show that Kelly's sophistication sets him apart from the typical criminal defendant in federal court, to the extent a "typical" defendant exists.

[7]The Court's discussion of counsel's performance at Kelly's criminal trial makes a lengthy analysis of the *Strickland* prejudice prong unnecessary. That said, by no stretch of imagination has Kelly shown with reasonable probability that the result of the trial would have been different had he testified. *See Strickland*, 466 U.S. at 694-95. Putting aside the potentially damaging character and "other act" evidence that may have been offered in rebuttal to his testimony, Kelly has not presented the Court with evidence refuting the government's substantive allegations. In a nutshell, Kelly has made no showing (much less a reasonable probability) that the

B. Trial Counsels' Alleged Failure to Investigate, Interview Potential Witnesses, Present Character Witnesses, and Failure to Prepare for Trial

In the second ground of his complaint, Kelly alleges that counsel neglected to interview potential witnesses, failed to call corroborating or character witnesses, failed to deliver on the opening statement made to the trier of fact, neglected to develop mitigating evidence or to otherwise investigate possible defenses, and generally failed to prepare for trial. Under the Strickland standard, those allegations are without merit.

As noted, Kelly was represented at trial by multiple attorneys, and those attorneys, in turn, were assisted by two investigators and a paralegal. Tr. 99-102. Jones testified that she spent nearly 500 hours preparing for trial; she researched and prepared 20-30 pretrial motions.[8] Tr. 104, 112. Jones examined thousands of documents produced by the government. Tr. 101-02. In a similar vein, Widener spent approximately 700 hours on Kelly's case, which included

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result of his trial would have been different had he testified.

[8]Incidentally, Jones testified that she had been the lead attorney in approximately 50 trials at the state and federal level, with the majority of that work occurring in federal district court. Though it hardly requires stating, "[e]xperience is due some respect" in assessing ineffective assistance of counsel allegations. *Chandler v. United States*, 218 F.3d 1305, 1316 n.18 (11th Cir. 2000) (en banc), *cert. denied*, --- U.S. ---, 121 S. Ct. 1217 (2001). Simply put, an "even stronger" presumption applies when the Court measures the performance of "an experienced trial counsel" against a habeas petitioner's allegations of constitutionally ineffective assistance. *Id.* at 1316.

research and analysis of the charges alleged in the indictment and possible defenses to those allegations, preparation of the jury charges, and drafting of documents; Widener prepared, for instance, the motion for new trial and the appellate briefs submitted to the Eleventh Circuit. Tr. 159-66. With the aid of Kelly's input, Kelly's attorneys prepared and thereafter introduced 144 exhibits that were admitted at trial. Tr. 115-17. Once again, the Court notes that Kelly sought the assistance of Jones and Widener for his appeal, and he expressed his contentment with their performance on several occasions months after the trial concluded. It is within that context that the Court now turns to the specific allegations raised in the second ground of Kelly's motion.

1. Failure to Interview or Call Witnesses

In the most pervasive allegation concerning the second ground of his motion, Kelly argues that his attorneys failed to interview or call potential witnesses. Of course, determining "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [this Court] will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.) (en banc), *cert. denied*. 516 U.S. 856 (1995). Here, Kelly complains that counsel failed to interview or call James Thomas ("Thomas"), who was employed as a financial advisor and pension plan administrator at Healthmaster in the early 1990s. Tr. 51-53. Thomas asserts that he delivered mail as part of his duties from approximately May 1991 through March 1993; in short, Kelly contends that Thomas' testimony would have negated an element of the mail fraud counts contained in counts 36-66 of the indictment, and that the money laundering allegations charged in counts 79-109 were predicated on those mail fraud counts.

Additionally, Kelly faults counsel for failing to interview or call Ken McIntosh ("McIntosh"), who selected computer software for the processing of claims used by the

Healthmaster organizations; Kelly contends that McIntosh "would have been a critical witness at trial concerning the embezzlement allegations" in counts 119-121 because he was responsible for the "dual-processing" of claims. Pet.'s Supp. Mem., App., p. 25. Similarly, Kelly contends that Dwight Bagwell ("Bagwell"), David Alalof, or Wes Mills should have been used as expert witnesses to show a lack of criminality concerning Kelly's actions. Kelly complains that counsel should have utilized character witnesses at trial; to take one example, Greg Bowles ("Bowles") testified at the evidentiary hearing that he was prepared to be a character witness at trial, but that he was neither interviewed nor called to the stand by Kelly's attorneys.

Kelly has shown neither deficient performance nor prejudice with respect to his trial attorneys' strategic decision, made with Kelly's input, not to call witnesses in defense of the criminal charges. While it is undisputed that counsel did not call any of the subpoenaed witnesses after the government rested its case, Kelly overlooks the reasons making counsel's decision reasonable.[9] First, because the trial judge obtained

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[9]The numerous documents submitted in this postconviction proceeding show that Kelly confuses the level of representation that is constitutionally required by the Sixth Amendment with what, in hindsight, may have been the most effective defense. However, "[t]he test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Waters*, 46 F.3d at 1512. "Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. To reiterate, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered

stipulations from each of the parties as to the authenticity of each parties' exhibits prior to trial, there was no need to authenticate those records via witness testimony. Tr. 124-28; *see* Fed. R. Evid. 901. The government's case and Kelly's conviction are paradigmatic of a document-orientated prosecution, and the trial judge's methodology made unnecessary custodian and witness testimony to authenticate the 144 trial exhibits prepared by defense counsel. By the same token, the government presented during its case in chief many of the same witnesses Kelly's counsel subpoenaed as potential witnesses. Tr. 124-28. Furthermore, as noted in the Court's discussion of Kelly's claim that he was denied his constitutional right to testify, Kelly was heavily involved in the decisions concerning what witnesses would testify in his behalf Tr. 133, 139.

Indeed, Jones testified that Kelly made the ultimate decision that, for instance, Thomas should not be called as a defense witness, and the Court credits that testimony. Moreover, Thomas' testimony would have added little; *even if* counsel had made the strategic determination that Thomas' testimony would not have contributed significantly to Kelly's defense, that decision is reasonable. The government offered direct evidence that *some* mailings had occurred through the testimony of Elizabeth Seigler ("Seigler"), who had served as a corporate officer of a holding company for the Preferred Care Companies.[10] *See* Trial Tr. Vol. 2, p. 359. Next, Thomas testified at the February 21st evidentiary hearing that he delivered mail to Managed Risk Services at its Columbia Road

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sound trial strategy.'" *Chandler*, 218 F.3d at 1314 (quoting *Darden v. Wainwright*, 477 U.S. 168, 186-87 (1986)).

[10]To be specific, Seigler's testimony was direct evidence of the mailings at issue in counts 67-78. *See* Pet.'s Supp. Mem., App., p. 16; *Suba*, 132 F.3d at 674.

address (in Augusta Georgia), but that he was unaware that Managed Risk Services had previously been covertly operated on-site at Healthmaster's corporate offices. Tr. 58. Thomas was also unaware that the Preferred Care checks in question were deposited into an Atlanta or Marietta bank account only a few days after delivery; further, Thomas testified that he had never seen a Preferred Care premium check up-close, and he therefore could not say with certainty that he ever delivered one of the Preferred Care premium checks. R. 55-57 . Notably, the mailings at issue in counts 36-78 occurred while Managed Risk Services was located on-site at Healthmaster rather than its Columbia Road address; Susan Colson ("Colson") testified at trial that Managed Risk Services was covertly operated on-site at Healthmaster during the entire time she worked there, that is, from June 1991 until May 1993. *See* Trial Tr., Vol. 2, pp. 270-72. Quite simply, there was direct evidence of some mailings and circumstantial evidence as to the other charged mailings; the Preferred Care premium checks were allegedly mailed between May 10, 1990 and March 31, 1993, and Thomas' testimony at trial about mail deliveries (to a Columbia Road) address after that date would have been of little probative value."[11] *See United States v. Hawkins*, 905 F.2d 1489, 1496 (11th Cir. 1990), *cert. denied*, 498 U.S. 1038 (1991).

In short, counsel had no obligation to present Thomas' testimony at trial. "Counsel is not required to present every nonfrivolous defense; nor is counsel required to present all mitigation evidence, even if additional mitigation evidence

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[11]Thomas' affidavit emphasizes that he delivered mail from May 1991 through March1993; at the evidentiary hearing, Thomas testified that he delivered the interoffice mail as part of his responsibilities from sometime in 1992 until 1995. *Compare* Thomas Aff., p. 3, *with* Tr. 53.

would not have been incompatible with counsel's strategy."[12] *Chandler*, 218 F.3 d at 1319 (citation omitted). At bottom, Kelly has not shown counsel's performance was constitutionally deficient, even if counsel had made the strategic decision not to call Thomas as a witness.[13] *See Waters*, 46 F.3d at 1512. Nor has Kelly demonstrated prejudice resulting from Thomas' failure to testify at trial. *See Strickland*, 466 U.S. at 694-95.

In a similar vein, Kelly has not met either prong of the *Strickland* standard concerning counsel's failure to call any

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[12]"Considering the realities of the courtroom, more is not always better. Stacking defenses can hurt a case. Good advocacy requires 'winnowing out' some arguments, witnesses, evidence, and so on, to stress others." *Chandler*, 218 F.3d at 1319 (citations omitted).

[13]As Jones explains, it was her understanding that Thomas could only testify that he delivered some of the checks at issue in counts 36 through 66. Jones Aff., p. 4. In a July 10, 1996 letter addressed to Widener, Kelly states that "some checks [were] picked up by James Thomas . . . ." Jones Aff., Ex. C. Similarly, in a September 8, 1995 telefax to Jones and Widener, Kelly stated, "Jamie can testify that he sometimes picked up checks." Jones Aff., Ex. B. Kelly criticizes the government's citation to the aforementioned fax and letter because they were composed only after the jury returned its verdict. To that end, "evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims." *Chandler*, 218 F.3d at 1318 (citing *Strickland*. 466 U.S. at 691). Here, the Court finds that the communications at issue, though written after Kelly had been adjudged guilty on most of the counts alleged in the indictment, shed light on Kelly's position concerning Thomas' testimony prior to Kelly's assertion of ineffective assistance in this § 2255 proceeding.

other witness to the stand. For instance, Bagwell testified on cross-examination at the evidentiary hearing he was unaware that the government stipulated at trial that the self insurance route actually saved Medicare money. Tr. 21. Likewise, Bagwell testified that he was ignorant of the government's evidence showing Kelly wrote checks withdrawing money from accounts over which he was the trustee; Bagwell acknowledged that he would not have been able to assist in Kelly's defense of that alleged wrongful conduct.[14] Tr. 22. As to potential character witnesses, the credible evidence shows that Kelly decided not to make character an issue because of evidence that would have almost certainly been presented by the government in rebuttal.[15] Tr. 133; *see supra*. Once again, *even if* trial counsel ultimately determined at trial that

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[14] Jones asserts that Kelly never mentioned Bagwell as a potential witness. Jones Aff., p. 3. The Court finds Jones' testimony on this issue credible; nonetheless, Kelly has made no showing how Bagwell's testimony may have led to a different result at trial. Thus, Kelly has not met his burden of showing prejudice under *Strickland*, irrespective of whether Jones' performance was objectively reasonable (which it was). *See Strickland*, 466 U.S. at 694-95.

[15] "There was, if Mr. Kelly was not going to testify, no reason to try to the call [sic] character witnesses for him. That was one of the reasons he did not want to testify because it would be putting character into evidence and that had the potential of great risks." Tr. 133 (Jones' testimony). The rule in this Circuit could hardly be clearer: "No absolute duty exists to introduce mitigating or character evidence." *Chandler*, 218 F .3d at 1319; *see also id.* at 1321 (citing Supreme Court cases where failure to introduce character evidence was effective performance because witnesses could have been subjected to harmful cross-examination or invited other damaging evidence).

character witnesses would not aid in Kelly's defense, that decision is objectively reasonable. *See Strickland*, 466 U.S. at 688; *Waters*, 46 F.3d at 1512.

Assuming for the sake of argument that trial counsel failed to conduct a formal interview of any potential witness, there has been no showing of prejudice resulting from that alleged omission.[16] *See Strickland*, 466 U.S. at 694-95. Simply put, Kelly has shown neither deficient performance nor prejudice ensuing from counsel's failure to present witnesses in defense of the criminal charges, nor has Kelly demonstrated prejudice resulting from a failure to interview potential witnesses; therefore, Kelly's allegation that counsel's failure to interview witnesses and present witness testimony constitutes ineffective assistance is to no avail.

2. Jones' Opening Statement and Trial Counsel's Investigation

Kelly's assertions that Jones did not follow through on the "promise[]" made in the opening statement and that trial counsel in general failed to conduct an adequate investigation are insufficient to show ineffective assistance under the two-

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[16]Explaining Kelly's plan to process claims "in-house," McIntosh indicated in his affidavit that he could "state with certainty that this process saved the health plan and the employees money." McIntosh Aff., p. 4. Citing that affidavit, Kelly's supplemental memorandum argues that "McIntosh would have been a critical witness at trial concerning the embezzlement allegations" because McIntosh was responsible for the "dual-processing" of claims. Kelly grossly overstates his position; there is nothing in McIntosh's affidavit (he did not testify at the evidentiary hearing) suggesting with reasonable probability that the result of the trial would have been different had McIntosh testified.

pronged *Strickland* standard. § 2255 Motion, p. 30. Kelly's conclusory claim that his case was not adequately investigated is refuted by the record; there is no doubt based on the evidence before the Court that the three attorneys who represented Kelly at trial, with the assistance of two investigators and a paralegal, thoroughly investigated the facts underlying the government's charges.[17] *See supra.*

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[17]Kelly emphasizes the testimony of the Honorable Daniel Joseph Craig ("Craig"), District Attorney, Augusta Judicial Circuit, in support of his claim that his trial attorneys failed to prepare for trial, and that he was essentially sandbagged by his attorneys' premature decision not to present evidence in defense of the criminal charges. Craig testified that, on the afternoon of the day on which the jury selection process concluded, Lumpkin commented to him that "there was no intention on the part of the defense to offer any evidence or witnesses in the case." Tr. 12; *see also* Craig Aff. While Kelly correctly points out that Craig testified as a disinterested witness, Craig's testimony is not especially probative of the relevant inquiry, that is, whether or not Kelly received constitutionally adequate representation. First, Craig could not recall whether Jones was present when Lumpkin allegedly made that comment, and Jones has consistently asserted that she was not a party to such a discussion and that no decision had been made prior to trial not to call any witnesses. Tr. 13; Jones Aff., p. 2. This Court credits that testimony. The record as a whole calls into question the accuracy of Lumpkin's isolated statement; certainly, the number of pretrial motions and exhibits presented by the defense shows that Kelly and his attorneys subjected the government's charges to adversarial testing. In any case, Craig frankly acknowledged that he had "no knowledge whatsoever" concerning the conversations between Kelly and his trial attorneys. Tr. 17. Stated simply, Craig's testimony merits mention, but it demonstrates *neither* deficient

Irrespective of that observation, however, Kelly has not demonstrated how a more rigorous investigation might have led to a different result at trial; thus, Kelly's conclusory allegation that counsel failed to investigate his case must fail. *See Strickland*, 466 U.S. at 694-95.

Kelly's criticism of Jones' opening statement is similarly misplaced. Kelly seemingly contends that Jones' opening statement promised to disprove, for instance, fraudulent intent and to show, instead, that Kelly was motivated by a desire to control costs; from there, Kelly argues that his trial attorneys essentially failed to produce any evidence in support of Jones' opening argument. However, Kelly has not accurately characterized the defense his attorneys put forward. As noted, trial counsel presented 144 trial exhibits; additionally, as the government presented during its case in chief witnesses that Kelly and his attorneys desired to call, counsel was able to elicit testimony from those officials in support of Kelly's defense. Even now, Kelly has not pointed the Court to evidence that, if presented at trial, might (with reasonable probability) have led to a different result; nor has Kelly shown that counsel's perspective and strategy as articulated in Jones' opening argument was then unreasonable.[18] In short, Kelly's contention that the opening

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performance in trial counsels' representation nor prejudice under the *Strickland* standard.

[18]Of course, in reviewing counsel's performance, a court must avoid using "the distorting effects of hindsight" and must evaluate the reasonableness of counsel's performance "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "The widespread use of the tactic of attacking trial counsel by showing what 'might have been' proves that nothing is clearer than hindsight--except perhaps the rule that we will not judge trial counsel's performance

statement and defense counsel's subsequent performance demonstrate ineffective assistance of counsel is without merit.[19] *See Strickland*, 466 U.S. 694-95.

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through hindsight." *Waters*, 46 F.3d at 1514. While Kelly now attacks a selective portion of Jones' opening statement, Jones' argument actually spanned over twenty pages in the transcript of the trial record. *See* Trial Tr., Vol. 1, pp. 34-56. Kelly has shown neither deficient performance nor prejudice with respect to Jones' opening argument.

[19]The record before this Court shows that Kelly, the government, and the parties' respective witnesses have speculated on the inferences that may be drawn from comments Jones allegedly made concerning valium or another anti-anxiety medication at or immediately preceding Kelly's trial. Based on the evidence of record and the testimony received at the February 21st evidentiary hearing, the Court finds Jones' assertions that she did not take valium or any other tranquilizer during any part of Kelly's trial credible. Tr. 135; *see also* Tr. 161-62 (Widener's testimony that he never observed Jones take any drugs and that Jones was an active advocate throughout trial). Further, what Jones ultimately did or did not *say* to Carroll Kelly Claxton and or to Carol Williams Kelly concerning her medication is immaterial in light of Kelly's failure to demonstrate any prejudice as a consequence of trial counsels' performance. *See. e.g., Bellamy v. Cogdell*, 974 F.2d 302, 306-309 (2d Cir. 1992) (en banc) (rejecting a per se rule of ineffective assistance to petitioner's claim that his attorney suffered from a mental incapacity), *cert. denied*, 507 U.S. 960 (1993); *Smith v. Ylst*, 826 F.2d 872, 875-76 (9th Cir. 1987) (requiring a showing of prejudice by a petitioner who claimed his attorney was mentally incompetent), *cert. denied*, 488 U.S. 829 (1988); *Hernandez v. Wainwright*, 634 F. Supp. 241, 245 (S.D. Fla. 1986) (holding habeas petitioner who alleged counsel was inebriated at trial must show prejudice), *aff'd*, 813

3. Trial Counsel's Failure to Cross-Examine Susan Colson

Kelly's supplemental memorandum argues that trial counsel failed to cross-examine prosecution witness Susan Colson, and that that omission demonstrates ineffective assistance. The record reveals the following colloquy:

> The Court: Do you have any questions?
> Mr. Cochran: We're reversing it for the next series of witnesses.
> The Court: Well, let me ask them first. Mr. Lumpkin, do you have any questions? That is the order of procedure.
> Mr. Lumpkin: We would gladly defer to Mr. Cochran.
> Mr. Cochran: If Your Honor recalls—I don't want them to be cut off from their questioning. Do you recall at the pretrial conference, we explained that on some witnesses we might shift lead counsel.
> The Court: You might shift lead counsel, but not the order of presentation.
> Mr. Kramer: That's fine, Your Honor. Thank you.

Trial Tr., Vol. 2, p. 284. Following that exchange, Mr. Cochran, counsel for codefendant Suba, cross-examined Colson. Now, citing *United States v. Cronic*, 466 U.S. 648 (1984), and *Davis v. Alaska*, 415 U.S. 308 (1974), Kelly argues that he was "denied the right of effective cross-examination, which would be constitutional error of the first magnitude, [and] no amount of showing of want of prejudice would cure it." Pet.'s Supp. Mem., App., p. 34 (citation omitted).

F.2d 409 (11th Cir. 1987).

At the outset, *Cronic* and *Davis* are inapposite to the case at bar. For instance, *Davis* addressed a trial court's limitation on a criminal defendant's right to cross-examine a "crucial" prosecution witness. *Davis*, 415 U.S. at 310. Notwithstanding Kelly's suggestion to the contrary, the record in the case *sub judice* shows no such interference by the trial judge on Kelly's constitutional right to cross-examine Colson; thus, Kelly's assertion that the trial court somehow denied him his constitutional right to confront the prosecution's witnesses is without merit.[20] In addition, Mr. Cochran's cross-examination of Colson, spanning seventeen pages in the trial record, shows that the government's case was subject to meaningful adve. arial testing. *Cf. Cronic*, 466 U.S. at 659. Jones testified at the evidentiary hearing that Kelly and Suba presented consistent defenses at trial, and Kelly has not disputed the accuracy of that assertion. Tr. 127-28. Tellingly, Kelly has not alleged prejudice from *his* counsel's failure to cross-examine Colson,[21] nor has Kelly provided any indication of questions not asked by Mr. Cochran that, if presented to Colson, may have led to a different result. *See Strickland*, 466

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[20]Citing *United States v. Frady*, 456 U.S. 1001 (1982), the government makes a strong argument that Kelly has waived any right to complain of this issue. While the Court is mindful of the limitations on habeas corpus review set forth in *Frady*, the Court's discussion shows that Kelly's allegation is frivolous, and, therefore, that it cannot serve as a basis for habeas corpus relief. Thus, the Court need not determine whether, under *Frady*, the issue is barred from review in this collateral attack on Kelly's convictions.

[21]"[T]here is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, 466 U.S. at 659 n.26 (citing *Strickland*, 466 U.S. at 693-94).

U.S. at 694-95. Thus, Kelly's claim that he was somehow denied his constitutional right to cross-examine Colson must fail.

4. The Joint Defense Agreement

Kelly complains for the first time in his most recent filing that trial counsel's disclosure of information about his primary defense (i.e. savings to the government) to counsel for codefendant Garrison merits habeas corpus relief Kelly did not raise this issue on appeal, *See Frady*, 456 U.S. at 167, and he now casts this issue as part of his general ineffective assistance of counsel allegation. Oddly, however, Kelly failed to argue this issue either in his § 2255 motion or at the evidentiary hearing held February 21, 2001; once again, though the issue has arguably been waived, it is clearly without merit.

Simply put, assuming *arguendo* a violation of the joint defense agreement (and that it is cognizable in this postconviction proceeding),[22] Kelly has not shown prejudice ensuing from that alleged violation. Kelly has failed to demonstrate that the government did not anticipate, based on the evidence it had before it, that Kelly's attorneys would likely argue "savings to the government" as part of Kelly's defense.[23] Assuming Garrison's attorneys improperly

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[22]Kelly's trial team did, in fact, allege a violation of joint defense agreement in its motion for continuance filed prior to sentencing; following an evidentiary hearing, that motion was denied by Judge Alaimo. *See generally* Motion for Continuance and Sentencing Tr. (Oct. 30, 1995).

[23]Jones testified that she would "be surprised" if Garrison's attorneys had not deduced on their own that Kelly and his counsel planned to focus on the savings that Kelly brought to the government. Tr. 157. Clearly, that conclusion is

conveyed Kelly's "savings" defense to the prosecution,[24] Kelly has not borne his burden of showing with reasonable probability that the trial would have ended differently had that alleged violation of the savings agreement not occurred. *See Darden*, 477 U.S. at 184.

5. Grouping of Counts Under the Sentencing Guidelines

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reasonable; *a fortiori* the government, with all of the evidence acquired during its investigation, likely would have deduced well before trial that very strategy.

[24]The government disputes that it ever learned anything about Kelly's defense from Garrison or her attorneys. To that end, Special Assistant United States Attorney Harrison W. Kohler testified that Craig Gillen, counsel for codefendant Garrison, only disclosed *Garrison's* planned defense. *See* Motion for Continuance and Sentencing Tr. (Oct. 30, 1995), p. 24. Irrespective of what Jones may have disclosed to Garrison's attorneys, Kelly has *not* shown that Garrison's attorneys relayed to the prosecution the substance of Kelly's "savings" defense. But, as explained in this Report and Recommendation, *assuming* Kelly could make that showing, Kelly has not demonstrated prejudice resulting from the disclosure that he alleges occurred. *See Strickland*, 466 U.S. at 694-95. In a similar vein, Kelly's citation to the Code of Professional Responsibility in support of a per se finding of prejudice is misplaced: "we do not understand the Supreme Court to make the ABA Standards part of the highest law of the land, even if one accepts that those standards reflect a good policy. We remember that these ABA Standards were also mentioned in *Strickland*; but the Court went onto shun per se rules." *Chandler*, 218 F.3d at 1317 n.21 (citing *Strickland*, 466 U.S. at 688-90; *Roe v. Flores*, 528 U.S. 470, 480-81 (2000)).

Citing *Glover v. United States*, --- U.S. ---, 121 S. Ct. 696 (2001), Kelly seemingly alleges that his trial counsel's failure to object to the grouping of the money laundering counts apart from the fraud counts constitutes ineffective assistance of counsel. The record belies that position. First, the record shows that trial counsel did raise the grouping issue at sentencing, arguing that the health care fraud allegations and related money laundering counts should have been grouped together and that the Preferred Care allegations and related money laundering counts should have been put in a second group. *See* Motion for Continuance and Sentencing Tr., p. 46-49. Though the District Court denied that objection, Kelly has shown neither deficient performance nor prejudice from trial counsel's alleged failure to raise the grouping issue. Further, the record shows that, when Kelly appeared before Judge Alaimo with current counsel of record in June 1998, Judge Alaimo resentenced Kelly according to the grouping Kelly initially sought. *See* Resentencing Hearing Tr., pp.37-40. Further, the Eleventh Circuit thereafter rejected (on the parties' cross-appeal) Kelly's argument "that the district court erred with respect to the grouping of the several counts."[25] *United States v. Kelly*, No. 98-8925 (11th Cir. Dec. 15, 1999).

Stated simply, *Glover* is not applicable, as trial counsel specifically argued for the favorable grouping to which, following remand, Kelly was then resentenced. Thus, Kelly has not shown either deficient performance or prejudice from his trial counsel's performance. Moreover, even if Kelly intended to argue the grouping issue as an independent ground apart from his ineffective assistance allegations (and it was not otherwise barred from review), the Eleventh Circuit has already passed on the District Court's grouping of the several counts; therefore, that issue is not before the Court in

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[25]As noted, on April 7, 2000, Kelly was once again sentenced to a term of 97 months imprisonment.

this § 2255 proceeding. *See Kastenbaum v. United States*, 588 F.2d 138, 139 (5th Cir. 1979) (per curiam).[26] However it is packaged, Kelly's complaint concerning the grouping of the counts under the Sentencing Guidelines is to no avail.

6. The Totality of the Evidence and the Combined Effect of Trial Counsel's Alleged Errors

The multiple memoranda Kelly has submitted to the Court in this proceeding suggest that the combined effect of trial counsel's alleged errors demonstrate ineffective assistance of trial counsel, or, in the alternative, that the government's evidence is insufficient to support Kelly's conviction on various counts. Kelly's position lacks traction. The Eleventh Circuit determined there was sufficient evidence to support the jury's verdict on the overwhelming majority of counts in which Kelly was charged.[27] *See Suba*, 132 F.3d at 671-72. Though Kelly faults the government's circumstantial evidence as to some mail fraud counts, the circumstantial evidence, including direct evidence on other mail fraud counts, was substantial. Further, the evidence supports the government's contention that Kelly, as the sole trustee of the employees' health self-insurance trust fund, improperly profited from that position by depositing money from that fund into his personal bank account.

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[26]Fifth Circuit cases decided prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[27]As explained, Kelly's trial counsel obtained not guilty verdicts on counts 33-35, 124, 129, and 130. On appeal, the government conceded to appellate counsel's claim that the evidence was insufficient to support guilty verdicts on counts 131 and 132. *See Suba*, 132 F.3d at 671-77.

Collectively considering the weight of trial counsel's alleged errors, Kelly has presented no evidence or witness testimony that shows with reasonable probability the result of the trial may have been different had counsel acted differently. *See Strickland*, 466 U.S. at 694-95. Nor has Kelly borne his burden of demonstrating that trial counsel's performance as to any individual decision or with respect to the defense strategy as a whole was objectively unreasonable.[28] *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Simply stated, this Court has no doubt, in light of the evidence of record, that the performance of Kelly's trial counsel well exceeded the minimum threshold required by the Sixth Amendment; in a similar vein, the Court states with certainty that Kelly received a fundamentally fair trial.[29] *See*

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[28]"Well, we didn't really have any affirmative defenses so there wasn't a lot of defenses to discuss other than to try to pokes [sic] holes in the Government's case. It was the classic criminal defense." Tr. 169 (Widener's testimony). To date, Kelly has not put forward an affirmative defense that either calls into question counsel's strategy or may have led to a different result at trial.

[29]Kelly argues that Jones' testimony concerning the defense strategy to preserve for appeal "the sufficiency of the evidence" illustrates a mistake of law warranting habeas corpus relief. *See* Pet.'s Supp. Mem., App., pp. 27-34. As Kelly correctly notes, Rule 29 of the Federal Rules of Criminal Procedure, as amended on December 1, 1994, provides that when a trial court reserves decision on a defendant's Rule 29 motion for acquittal, "the trial court is to consider only the evidence submitted at the time of the motion in making its ruling . . . . [a]nd in reviewing a trial court's ruling, the appellate court would be similarly situated." Advisory Committee Notes, Fed. R. Crim. P. 29. But Kelly has shown neither deficient performance nor prejudice in counsel's

representation. Though Kelly emphasizes that the defense rested its case only *after* Judge Alaimo reserved ruling on Kelly's Rule 29 motion, Jones' testimony and the trial record suggest that Jones, after consulting with Kelly and co-counsel, determined prior to making the Rule 29 motion that the defense would stand on the evidence put forth in the prosecution's case in chief. Tr. 131 ("The final decision not to testify was made by Mr. Kelly during the break [at Trial Tr., Vol. 3, p. 235] right before the Government rested"); *see* Trial Tr., Vol. 3, pp. 285-86 (making motion for acquittal and resting Kelly's defense). Judge Alaimo *subsequently* reserved ruling on the motions for judgments of acquittal. *See id.* at pp. 318-22. Citing then-Judge Scalia's opinion in *United States v. Foster*, 783 F.2d 1082, 1086 (D.C. Cir. 1986) (en bane), Kelly contends that the *only* reasonable action after Judge Alaimo reserved ruling on the motion would have been to proceed with a defense. While *Foster* was a Rule 29 decision, it was *not*, as Kelly implies, an ineffective assistance of counsel case. Further, the primary Eleventh Circuit decision cited by Kelly, *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995), *cert. denied*, 516 U.S. 1111 (1996), belies Kelly's contention that Jones was required to present additional evidence after Judge Alaimo signaled his intention to reserve ruling on the motion: "a statement by a defendant, if disbelieved by the jury, may be considered as *substantive evidence* of the defendant's guilt." (citations omitted, italics in original). As discussed throughout this Report and Recommendation, Kelly has pointed to no evidence showing under even the most liberal standard that such evidence may have led to a different result at trial. *See Strickland*. 466 U.S. at 694-95. In addition, after reviewing the evidence of record before this Court, the Court has no doubt that hypothetical competent counsel could have reasonably acted, under the same circumstances, as did trial counsel in the case at bar. *See Waters*, 46 F.3d at 1512. To reiterate, Kelly has not met either prong of the *Strickland* standard on his allegation that trial

Strickland, 466 U.S. at 688, 697.

C. Abandonment on Appeal

The third ground of Kelly's motion argues that Jones and Widener abandoned him during the appellate process, thus rendering constitutionally ineffective assistance of counsel. Once again, the record refutes Kelly's allegation. For example, an August 7, 1997 letter Kelly sent to Jones states as follows: "I am seeking representation for my resentencing and will no longer require your services. I understand that you will remain my attorney on the appellate issues and will send me a copy of the decision and your analysis, but once that occurs our relationship is over." Jones Aff., Ex. E. Further, the letter as a whole supports Jones' testimony that she informed Kelly of the District Court's Local Rule requiring counsel practicing *pro hac vice* to associate with local counsel,[30] and that Kelly thereafter notified Jones that he had made other arrangements for representation following issuance of the Eleventh Circuit's decision. Ultimately, Kelly decided to retain other counsel. Tr. 141-42.

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counsel was ineffective for failing to present evidence following their Rule 29 motion.

[30]Mr. Lumpkin was not available to serve as local counsel at this time. Jones testified that Kelly had withdrawn funds and depleted the account that secured the attorneys' fees and expenses for Kelly's appeal; had Jones independently made arrangements to associate local counsel, that expense, it so appeared, would have been borne by the McNair Law Firm. Tr. 154. Incidentally, Widener's affidavit states that there remains a balance of nearly $130,000 for fees and costs incurred by the McNair Law Firm throughout its representation of Kelly. Widener Aff., p. 3.

Following the Eleventh Circuit's January 9, 1998 decision, Jones and Widener served Kelly with copies of both the decision and their motion to be relieved of counsel. Jones Aff., p. 6; Jones Aff., Ex. F. The correspondence accompanying those documents, dated January 21, 1998, informed Kelly of the January 29th deadline for filing a petition for rehearing, and also informed Kelly to contact Jones and Widener immediately in the event that he had changed his mind about being represented by the McNair Law Firm. Jones Aff., Ex. F. No objections were filed to the motion to withdraw, and the Eleventh Circuit granted the motion on February 2, 1998. Jones Aff., Ex. G. In his affidavit, Widener states that Jones informed him, following oral argument before the Eleventh Circuit Court of Appeals, that Kelly had decided to retain new counsel for any further proceedings following the appellate court's decision. Widener Aff., p. 3.

In sum, Kelly's assertion that he was abandoned during the appeals process by his attorneys is not supported by the evidence. Putting that aside, however, Kelly has failed to demonstrate that he suffered prejudice from any actions taken by Jones and Widener. The Eleventh Circuit reversed Kelly's conviction as to two counts and remanded for resentencing. *See Suba*, 132 F.3d at 677. Kelly filed a petition for rehearing with the Eleventh Circuit. Thereafter, Kelly was sentenced by the District Court to term of 97 months imprisonment. Tr. 88-90. Thus, Kelly's term of imprisonment was reduced at resentencing by more than 50 months; though Kelly now criticizes the performance of Jones and Widener, the reduction in Kelly's sentence is due in part to their efforts. Further, Kelly terminated Jones and Widener, and, therefore, they did not "abandon" Kelly. Accordingly, Kelly's ineffective

assistance allegations concerning the performance of his appellate counsel are without merit.[31]

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[31]Kelly's supplemental memorandum accentuates a comprehensive ineffective assistance of appellate counsel claim at the expense of his "abandonment on appeal" allegation. For instance, Kelly now asserts that Jones and Widener ignored his observation, based on the Tenth Circuit's discussion in *United States v. Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994), that evidence of concealment must be substantial to support a conviction under the federal money laundering statute. *See* Pet.'s Supp. Mem., App., pp. 40-43. Kelly complains that his appellate counsel relied on a Fifth Circuit case, *United States v. Dobbs*, 63 F.3d 391 (5th Cir. 1995), rather than *Garcia-Emanuel*; "Kelly contends that had counsel utilized the *Garcia-Emanuel* case in its brief that Circuit Judge Hill [who authored *Suba*] would have embraced its holding as he [subsequently] did in *United States v. Majors*[, 196 F.3d 1206, 1213 (11th Cir. 1999), *cert. denied*, 529 U.S. 1137 (2000)]." Pet.'s Supp. Mem., App., p. 42. Kelly's contention utterly fails both prongs of the ineffective assistance test. In *Majors*, Senior Circuit Judge Hill affirmed the appellants' money laundering convictions, noting that "[moving money through a large number of accounts . . . even when all the accounts to which the defendant transferred the money and from which he withdrew were in his own name[,]" is sufficient to support a money laundering conviction. *Majors*, 196 F.3d at 1214. In short, Kelly's reliance on *Majors* and *Garcia-Emanuel* is misplaced; Kelly's convictions are not called into question by either decision. Further, appellate counsels' failure to cite a case suggested by a habeas petitioner does not demonstrate constitutionally inadequate representation. *See, e.g., White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances"), *cert. denied*, 514 U.S.1131 (1995). Finally, Kelly's argument that appellate counsel provided inadequate representation by failing to

D. The Forfeiture Issue

Citing *United States v. Bajakajian*, 524 U.S. 321 (1998), Kelly argues in the final ground of his § 2255 motion that the Supreme Court's decision warrants reconsideration of the forfeiture Order. Assuming the applicability of that decision in this postconviction proceeding, and putting aside the fact that Kelly agreed and stipulated to the forfeiture Order, Kelly's reliance on *Bajakajian* is misplaced. In *Bajakajian*, the Court held that the Eighth Amendment's prohibition on excessive fines was violated by the forfeiture of the entire $357,144 possessed by a defendant convicted *only* of failing to report the transportation outside the United States of more than $10,000 in currency. *See Bajakajian*, 524 U.S. 334-40. Kelly's convictions are readily distinguishable from those before the Supreme Court in *Bajakajian*, and Kelly's argument that the "intervening" decision warrants reconsideration of the forfeiture Order is patently frivolous.[32]

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challenge the probation officer's *recommendation* as to the amount of restitution, which was subsequently *adopted* by the District Court, is without merit. *See, e.g.*, 18 U.S.C. § 3664; *United States v. Page*, 69 F.3d 482, 492-95 (11th Cir. 1995); *United States v. Padgett*, 892 F.2d 445, 448-49 (6th Cir. 1989).

[32] Furthermore, as the District Court found, respondent's violation was unrelated to any other illegal activities. The money was the proceeds of legal activity, and was to be used to repay a lawful debt. Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally

III. CONCLUSION

For the reasons stated above, the Court **FINDS** that the stated grounds for relief in Kelly's motion to vacate, set aside, or correct his sentence are without merit. Accordingly, the Court **HEREBY REPORTS** and **RECOMMENDS** that Kelly's § 2255 motion be **DENIED**, that this civil action be **CLOSED**, and that a final judgment be **ENTERED** in favor of the government.

SO REPORTED AND RECOMMENDED this 30th day of April, 2001, at Augusta, Georgia.

s/ W. Leon Barfield
W. LEON BARFIELD
UNITED STATES MAGISTRATE JUDGE

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designed: He is not a money launderer, a drug trafficker, or a tax evader.

Bajakajian, 524 U.S. at 337-38.

FILED
U.S. DIST. COURT
AUGUSTA DIV.
2001 APR 30 A 11:54
CLERK /s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DENNIS J. KELLY,	)	
	)	
Petitioner,	)	
	)	
v.	)	CV 199-010
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Let a copy of this Report and Recommendation be served upon counsel for the parties. Any party who objects to this Report and Recommendation or anything in it must file, not later than May 14, 2001, specific objections with the Clerk of this Court. The Clerk will submit this Report and Recommendation together with any objections to the Honorable Anthony A. Alaimo, United States District Judge, on May 15, 2001. Failure to file specific objections will bar any later challenge or review of the factual findings of the Magistrate Judge. *See* 28 U.S.C. § 636(b)(l)(C); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (*en banc*). In order to challenge the findings and recommendations of the Magistrate

Judge, a party must, by May 14, 2001, file with the Clerk of the Court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

Requests for extension of time to file objections to this Report and Recommendation shall be directed to the Honorable Anthony A. Alaimo.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a *de novo* determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the Magistrate Judge. The Judge, however, need conduct a hearing only in his discretion or if required bylaw, and may consider the record developed before the Magistrate Judge, making his own determination on the basis of that record. The Judge may also receive further evidence, recall witnesses or recommit the matter to the Magistrate Judge with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a United States District Judge.

A party may not appeal a Magistrate Judge's recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the discretion of a District Judge.

The Clerk is **DIRECTED** to serve a copy of this Report and Recommendation on counsel for all parties.

SO ORDERED this 30th day of April, 2001, at Augusta, Georgia.

s/ W. Leon Barfield
W. LEON BARFIELD
UNITED STATES MAGISTRATE JUDGE

UNITED STATES of America,
Plaintiff-Appellee,

v.

David W. SUBA, Managed Risk Services,
Dennis J. Kelly, Defendants-Appellants.

No. 95-9408

United States Court of Appeals,
Eleventh Circuit.

Jan. 9, 1998.

Richard E. Allen, Augusta, GA, James Davis Hyder, Jr., Paine McElreath & Hyder, Augusta, GA, for Suba and Managed Risk Services.

Celeste T. Jones, Robert L. Widener, McNair & Sanford, P.A., Columbia, SC, for Kelly

Harry D. Dixon, U.S. Atty., Savannah, GA, Vicki S. Marani, U.S. Dept. of Justice, Crim. Div., Appellate Section, Washington, DC, for Plaintiff-Appellee.

Appeals from the United States District Court for the Southern District of Georgia.

Before BARKETT, Circuit Judge, HILL, Senior Circuit Judge, and HOWARD*, Senior District Judge.

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*Honorable Alex T. Howard, Jr., Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

HILL, Senior Circuit Judge:

Jointly tried and convicted by a jury in a complex Medicare fraud scheme, Appellants Dennis J. Kelly, David W. Suba, and Managed Risk Services, Inc. (Managed Risk) appeal their convictions and sentences on a number of grounds, including insufficiency of the evidence, trial court error in denying Kelly's requested jury charges and motion for a new trial, and sentencing, restitution, and forfeiture errors.[1] We reverse Kelly's conviction only as to Counts 131 and 132 for insufficient evidence and remand his case for re-sentencing in accordance with this opinion. In all other respects, we affirm Kelly's conviction and the convictions and sentences of Suba and Managed Risk.

I. PROCEDURAL BACKGROUND

Together, Kelly, Suba, and Managed Risk were convicted of one count of conspiracy to defraud the United States and to commit offenses against the United States, in violation of 18 U.S.C. § 371 (Count 1); forty-five counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts 36-78, 100-111); and twenty-seven counts of money laundering, in violation of 18 U.S.C. § 1956 (Counts 79-105). Separately, Kelly was convicted of four additional counts of mail fraud (Counts 112-115); six counts of embezzlement from an employee benefit fund, in violation of 18 U.S.C. § 664 (Counts 116-121); eleven additional counts of money laundering (Counts

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[1]We discuss the sufficiency of the evidence issue at Part V *infra*. All other issues are without merit and affirmed without discussion. *See* 11th Cir. R. 36-1 [Appellants' trial may not have been perfect, but it was fair. *See United States v. Ashworth*, 836 F.2d 260, 268 (6th Cir. 1988), *citing United States v. Hajal*, 555 F.2d 558, 569 (6th Cir. 1977) (where "we have yet to review a perfect jury trial.")].

106-109, 122-123, 125-128, 132); one count of bank fraud, in violation of 18 U.S.C. § 1344 (Count 131); and nineteen counts of making false statements, in violation of 18 U.S.C. § 1001 (Counts 11-26, 30-32).[2] Kelly was sentenced to 151 months' imprisonment followed by three years' supervised release. He was ordered to pay a $75,000 fine, $710,118 in restitution, and to forfeit $934,856.02 under a consent order for criminal forfeiture, 18 U.S.C. § 982 (Count 133). The jury found Suba guilty of all counts charged. He was sentenced to ninety-seven months' imprisonment followed by three years' supervised release. Managed Risk was found guilty of all counts charged. It was placed on five years' probation and ordered to pay a $250,000 fine. Suba and Managed Risk were ordered to pay $710,118 in restitution and to forfeit $390,000 pursuant to the consent order. Both Kelly and Suba are currently incarcerated.

II. FACTUAL BACKGROUND

A. *Factual Diagram*

The underlying facts of this case are complex and have been reconstructed from numerous and sometimes tedious paper trails throughout the record. At first, the scheme appears sophisticated. In fact, however, it is really quite simple. Home health care agencies are licensed by Medicare.[3]

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[2]Kelly was found not guilty on counts 33-35, 124, 129, and 130.

[3]The Medicare program, Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq. (the Medicare Act), was established in 1965 as a federally funded health care insurance program for the elderly and disabled. The Medicare program is divided into two distinct parts: Medicare Part A (Hospital Insurance for the Aged and Disabled) covers services furnished by hospitals, home health care agencies, hospices,

Medicare is administered by the United States Department of Health and Human Services (HHS). HHS contracts with insurance companies (fiscal intermediaries) to distribute Medicare funds.[4] The fiscal intermediary pay the Medicare funding to providers of medical care, in this case, home health care agencies. Medicare covers the reasonable cost of direct patient care and reasonable and necessary overhead expenses.[5]

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and skilled nursing facilities for inpatient hospital care, inpatient care in a skilled nursing facility following hospital stay, home health care, and hospice care. Medicare Part B (Supplementary Medical Insurance for the Aged and Disabled) covers physician services, outpatient hospital care and a range of other non-institutional services, such as ambulance services, durable medical equipment, diagnostic laboratory tests and X-rays.

[4]Fiscal intermediaries and carriers are government contractors who administer payments to health care providers. 42 U.S.C. §§ 1395h, 1395u. Fiscal intermediaries handle claims covered under Medicare's Part A program; carriers handle claims covered under Part B. Once treatment is administered, Medicare, through its fiscal intermediaries and carriers, determines the rates and amounts of payments to providers, and reimburses the patient. *Id.*

[5]Insuring fiscal responsibility, curtailing health care costs, and eliminating the over-utilization of health care services are fundamental aims of the Medicare program. S.Rep.No. 404, 89th Cong., 1st Sess. 1965, *reprinted in* 1965 U.S.C.C.A.N. 1943. The Medicare program reflects a congressional judgment that the federal government should not readily reimburse a health care provider when its services have not been utilized properly. *Monmouth Medical Center v. Harris*, 646 F.2d 74, 76 (3d Cir. 1981). There could be nothing clearer in the plain meaning of the [Medicare Act] . . .

Appellants allegedly established certain overhead expenses, appearing genuine, but in fact, neither reasonable or necessary. These expenses were reimbursed by Medicare. The reimbursed funds allegedly found their way into Appellants' pockets.[6]

The following is a pictorial diagram[7] of the interrelationships of the participants in the sequence of events leading up to the indictment: [Diagram omitted]

B. *The Medicare Conspirators Charged*[8]

Congress did not intend to have Medicare funds used to subsidize Medicare fraud. *Good Luck Nursing Home, Inc. v. Harris*, 204 U.S. App. D.C. 300, 636 F.2d 572, 575 (D.C. Cir. 1980).

[6]Understanding how the Appellants committed Medicare fraud, and how that fraud relates to charges of false statements, money laundering, mail fraud and embezzlement from an employee benefit fund is critical in an analysis of the sufficiency of the evidence.

[7]This diagram was prepared by counsel for the United States as Government Exhibit (GX) 1161G and attached to its brief. It should be viewed with that in mind. We believe it is helpful in understanding the factual background of this case.

[8]The 133-count indictment was originally returned against six defendants: Jeannette G. Garrison, Healthmaster, Inc. (Healthmaster), and Master Health Plan, Inc. (Master Health), as well as Appellants. Prior to trial, Garrison entered a guilty plea to the conspiracy count and nine counts of making false statements. The submission of false cost reports to Healthmaster's fiscal intermediary formed the basis for her guilty plea. In return, she received a prison sentence and

1. *Healthmaster, Garrison & Master Health*

Healthmaster, Inc. (Healthmaster) was a large, yet privately owned, home health care company based in Augusta, Georgia.[9] Jeannette G. Garrison was its chief executive officer and sole shareholder.[10] Healthmaster provided in-home nursing care for eligible persons with illnesses and disabilities. Approximately 92% of Healthmaster's revenues were derived from providing in-home nursing care to Medicare eligible patients. The balance was reimbursed by Medicaid and private insurance.

Medicare guidelines provide reimbursement to Healthmaster for costs of direct patient care and reasonable

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charges against Healthmaster and Master Health were dismissed. Garrison testified for the government at trial. The appeal of her sentence is currently pending before this court.

[9]Healthmaster operated in five states with twenty-two divisions in 125 separate locations. It is estimated that 3,000 employees made two million home visits per year. Healthmaster had approximate gross annual revenue of $100 million.

[10]Garrison also was the sole shareholder of Preferred Care Companies (Preferred Care or PCC), a holding company owning Healthmaster Pharmaceutical and Equipment Company, Inc. (Healthmaster Pharmaceutical), a durable medical equipment sales company, and Healthmaster Home Care of Georgia, Inc. (Healthmaster Home Care), a provider of home visitation services, other than skilled nursing. Both Healthmaster Pharmaceutical and Healthmaster Home Care were non-Medicare reimbursed companies.

and necessary overhead expenses.[11] Reimbursements claimed by Healthmaster were submitted on cost reports to Aetna Life and Casualty Insurance Company (Aetna), the fiscal intermediary for HHS, who apparently did not discover any improper submissions. The cost reports required Healthmaster to declare whether or not its business transactions, such as purchasing supplies or services, were conducted with companies to whom it was "related."[12] Master Health Plan, Inc. (Master Health), Garrison's health maintenance organization (HMO), as a wholly owned subsidiary of Healthmaster, was a related company under Medicare guidelines.

2. *Kelly, Suba & Managed Risk*

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[11]The Medicare Act provides a controlling Standard against which all coverage determinations must be measured under Part A: "Notwithstanding any other provision of this sub-chapter, no payment may be made . . . for any expenses incurred for items or services which . . . are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." 42 U.S.C. § 1395y(a)(1)(A).

[12]An organization is "related" to the healthcare provider through common ownership which "exists if an individual or individuals possess significant ownership or equity in the provider and the institution or organization serving the provider." 42 C.F.R. § 413.17(b)(2). In general, Medicare will reimburse a home health care agency for only the cost of the supplies or services received from the related company. *See* 42 C.F.R. § 413.17(c); *United States v. Calhoon*, 97 F.3d 518, 525 (11th Cir. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 44, 139 L.Ed.2d 11 (1997) (involving the reimbursement by Medicare of royalty fees paid to a hospital's related company).

Kelly was a certified public accountant and chief financial officer and vice-president of Healthmaster, second in command to Garrison. Kelly was also the trustee for Healthmaster's self-insured worker's compensation trust fund. In 1990, upon Kelly's recommendation, Garrison hired Suba as Healthmaster's insurance risk manager to reduce the worker's compensation claims and injuries of Healthmaster's three thousand employees.

That same year, Kelly and Suba formed their own company, Managed Risk, ostensibly to provide risk management for self-insured worker's compensation and health insurance funds. Suba owned twenty-four percent of Managed Risk and served as its president. Mrs. Kelly owned twenty-four percent. Majority ownership (fifty-two percent) was owned by two trusts controlled by Garrison and Kelly for the benefit of the Garrison children. Managed Risk operated out of Healthmaster's Augusta corporate offices yet it maintained a mailing (post office box) address in Atlanta. Business cards for Managed Risk listed an Atlanta answering service telephone number as its business number. Healthmaster was Managed Risk's primary client.

C. *The Components of the Conspiracy*

1. *The Conspiracy Itself (Count 1)*

The indictment charged that Garrison, Kelly, Suba, Healthmaster, Master Health and Managed Risk conspired together to defraud the United States through its Medicare program by fraudulently obtaining Medicare reimbursement for many different categories of items. Garrison was charged with Healthmaster's submission of cost reports that fraudulently sought reimbursement for her political contributions; for the wages of Healthmaster ghost employees (actually working at non-Medicare reimbursed companies); and for many of her own personal expenses. Garrison pleaded

guilty to conspiracy and nine counts of making false statements. *See* note 8 *supra*. Count 1 of the indictment also charged Appellants with non-disclosure of related companies; with fraudulently obtaining workers compensation insurance premiums payable to Managed Risk from Preferred Care companies and fraudulently distributed to Managed Risk shareholders; with embezzling money from an employee benefit plan; and with concealing the source of the fraudulently obtained funds.

2. *The Preferred Care (PCC) Allegations (Counts 36-109)*

The Preferred Care allegations are touted to be the centerpiece of the Government's case. The allegations originate with Healthmaster's application for state (Georgia) approval of its self-insured worker's compensation program. Initially Healthmaster's application was rejected on the grounds of insufficient funds necessary to satisfy the State of Georgia's required two-tone asset-to-liability ratio. Thereafter, to supplement its assets, Healthmaster listed as its workers' compensation program affiliate, the Preferred Care Companies (Preferred Care or PCC), a Garrison-owned holding company, and reapplied for self-insurance. *See* note 10 *supra*. Now armed with adequate assets to ensure payment of claims, the State of Georgia granted Healthmaster's re-application to self-insure, upon the condition that it post a $500,000 bond. Healthmaster posted the bond. Kelly was the principal signatory on the second application. The re-application pledged to pay workers' compensation claims out from an irrevocable trust funded upon an actuarial basis (the Augusta WC account described below).

The Government alleges that Kelly, Suba and Managed Risk abused Healthmaster's affiliation with Preferred Care by illegally converting (for their own use) premiums intended for the benefit of Preferred Care employees. By so doing, Medicare was also defrauded. The scheme was accomplished,

the Government contends, as follows: Kelly established a trust account at the Trust Company Bank in Augusta (the Augusta WC account).[13] Healthmaster administered its self-insured workers' compensation program through the Augusta WC account. From May 1990, through March 1993, Preferred Care was billed for and paid $1,420,237 in workers' compensation premiums. However, the Preferred Care checks were not mailed to or deposited in the Augusta WC account as pledged. Instead, the Preferred Care checks were mailed to Managed Risk's Atlanta post office box. Elizabeth Siegler, a Preferred Care employee, testified that she signed and mailed twelve premium checks to the Managed Risk Atlanta post office box (Counts 67-78); her predecessor, Debra Chance, testified that she signed the check used to buy the bond (Count 36) and thirty other premiums checks (Counts 37-66), all made payable to Managed Risk and mailed to the Atlanta post office box. The checks were endorsed and deposited into Managed Risk bank accounts in Atlanta and Marietta (Georgia), by Suba on dates after their issuance. Kelly and Suba applied the first $140,000 towards the purchase of the bond (Count 36). The funds were then distributed to Managed Risk shareholders (Mrs. Kelly, Suba, and the Garrison children's trusts). Between November 1990, and April 1993, Managed Risk distributed $1,719,000 (including the $1,420,237 in Preferred Care premiums) to its shareholders via twenty-seven checks signed by Suba. Mrs. Kelly received $640,000; Suba received $390,000; and the Garrison children's trusts each received $344,500. In the meantime, four things allegedly occurred: (1)

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[13]The Augusta WC account funded a separate small claims account to pay employees' claims up to $25,000. Kelly and Suba established an other account at the Midland Bank Trust Corporation in the Cayman Islands to provide coverage for claims greater than $25,000, up to $250,000. Commercial insurance coverage was obtained for Healthmaster employee claims above $250,000.

Healthmaster properly deposited its workers' compensation premium checks into the Augusta WC account; (2) Medicare reimbursed Healthmaster for the checks; (3) Preferred Care employees made claims of $225,000 for their compensable injuries out of the Augusta WC account; and (4) Preferred Care employees were paid from the Augusta WC account, comprised of Medicare-reimbursed funds. The net result of this shell game, the Government contends, is that non-Medicare Preferred Care employees received $225,000 in Medicare-reimbursed funds.

(a) *Mail Fraud (Counts 36-78)*

The Government contends that Kelly and Suba committed mail fraud by using the United States mails to carry out their Medicare fraud scheme. As described above, in accordance with a schedule prepared by Kelly, a Preferred Care employee signed and mailed twelve workers' compensation premium checks (Counts 67-78) to Managed Risk at its Atlanta post office box. Another Preferred Care employee signed the check used to buy the $500,000 Healthmaster bond required by the state (Count 36) and thirty premium checks (Counts 37-66). All checks were mailed to Atlanta or Marietta from Augusta, made payable to Managed Risk, and endorsed and deposited by Suba in Atlanta and Marietta.

(b) *Money Laundering (Counts 79-105)*

The indictment further charged Appellants with money laundering on the basis that the money in the Augusta WC account used to satisfy the $225,000 in claims consisted solely of Healthmaster premiums, reimbursed by Medicare. Thus, Government contends, Medicare funds were illegally used to satisfy (non-reimbursable) Preferred Care claims. In addition, the Preferred Care premiums were illegally converted by Managed Risk shareholders.

(c) *Money Laundering (Counts 106-109) by Kelly Only*

The Government alleged that Kelly further laundered the proceeds converted and distributed to Mrs. Kelly by investing these proceeds in stock and land.

3. *The Health Insurance Fund Allegations (Counts 112-123; 125-128)*

The Health Insurance Fund allegations arise out of a trust account (the Greenville account) established by Healthmaster at the Carolina First Bank in Greenville, South Carolina for the benefit of its self-insured employee health and disability plan and administered by HDR, an independent third party administrator. Kelly was trustee of the Greenville account. He apparently determined the monthly $200,000 to $300,000 (in Medicare reimbursable) premiums paid Into the Greenville account by Healthmaster.

(a) *Mail Fraud (Counts 112-115) by Kelly Only*

The Government alleged that Kelly, over a two-year period, disbursed $1,587,775 from the Greenville account for his own benefit and that of Master Health. He is alleged to have accomplished this scheme as follows: Kelly established another bank account in Augusta (the Augusta II account). He used false representations of being able to obtain a "higher yield" to induce HDR to mail Greenville account funds to him, which he deposited in the Augusta II account ($700,000; $500,000; $258,775; and $129,000). Kelly never returned the money to the Greenville account and improperly characterized two of the checks on Healthmaster's Annual Return, IRS Form 5500, as paid claims, rather than loans, transfers or investments.

(b) *Embezzlement from an Employee Benefit Plan (Counts 116-118) by Kelly Only for Master Health's Benefit*

Kelly then, the Government alleged, embezzled $960,583 through three transfers from the Augusta II account funds (composed of Medicare reimbursed funds transferred from the Greenville account) and used them to purchase a $1 million certificate of deposit for Master Health (a non-Medicare company) in order for Master Health to meet new state minimum capitalization requirements for HMOs.

(c) *Embezzlement from an Employee Benefit Plan (Counts 119-121) by Kelly Only for Kelly's Benefit*

Similarly, the Government alleged, Kelly withdrew funds from the Augusta II account and deposited them into other accounts he controlled: (1) $78,400 payable for "data processing 91/92" to a "special activity account" established by Kelly for Employee Benefit Coordinators (EBC)[14] ; (2) $116,160 payable to the Managed Risk advertising account; and (3) one year after EBC dissolved, Kelly wrote a $71,256 check from the August 11 account and deposited it into the (now defunct) EBC's "special activity account."

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[14]EBC was a non-Medicare company established in 1987 by Kelly, Garrison and EBC's president, Peter Molloy, to market Master Health. Molloy was also vice-president of Healthmaster. He testified that he was unaware of the August II account or the EBC "special activity account." In fact, Molloy testified that Kelly had opened the EBC account with a signature card on which he signed both his name and Molloy's name, without Molloy's knowledge or permission. There is no record of any work, advertising or data processing, performed for the health insurance fund by either EBC or Managed Risk.

(d) *Money Laundering (Counts 122-123, 125-128) by Kelly Only*

The indictment charges Kelly with money laundering the three checks described in (c) above. None of the three checks were reported on his income tax return:

a. *The $78,400 Check*

On the same day as the transaction discussed in (c) above, Kelly wrote a second $78,400 check on the EBC account payable to his brother's company, AMAT Telecommunications (AMAT), for non-existent data processing services.[15] Twelve days later, Kelly's brother wrote a $78,400 check from AMAT's account to Kelly's personal "rental account."

b. *The $116,160 Check*

Two weeks after Kelly transferred $116,160 from the Greenville account to the Augusta II account and deposited the funds in Managed Risk's advertising account, he moved $100,000 from the advertising account into his personal investment company, Icarus Investments, as a "loan." Two weeks after that, Icarus Investments bought South Carolina real estate for $44,870.

c. *The $71,256 Check*

After Kelly transferred $71,256 from the Greenville account to the Augusta II account and deposited it into EBC's special activity account, he then moved $85,000 from the special activity account to Icarus Investments' account as a "loan." One week later, Kelly transferred the amount

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[15]Kelly was an officer of AMAT, but AMAT performed no work for EBC.

remaining from the previous "loan" and deposited the total [$140,000] into his personal bank account from Icarus Investments.

4. *The Sizemore Allegations--Mail Fraud (Counts 110-111)*

These counts are based upon an allegedly fraudulent invoice from Managed Risk to Healthmaster's Augusta WC account for a $125,000 "additional premium." The Government contends that Managed Risk agreed to purchase a $125,000 Trust Company Bank certificate of deposit for Sizemore Security to use as collateral for a bond necessary to qualify as a self-insured.[16] With supplemented assets, Sizemore Security would be able to self-insure and Managed Risk would obtain a new client. Managed Risk reimbursed itself for the certificate of deposit with Medicare-reimbursed Augusta WC account funds. Documentation was prepared, allegedly making it appear that the Augusta WC account owed a $125,000 "additional premium" to Managed Risk. These request documents were mailed to Trust Company Bank which in turn mailed the requested check to Managed Risk's Atlanta post office box. Thus, the Government contends, that Kelly, Suba and Managed Risk defrauded Medicare and the Augusta WC account by billing the account for a non-existing premium.

Kelly argues that there is no evidence of a scheme to defraud the (Medicare funded) Augusta WC account because he had investment authority over the account, and, after Sizemore Security repaid the loan for the certificate of deposit, Managed Risk returned the principal, with interest, to the Augusta WC fund. Suba claims he had no knowledge of the wording on the invoice and that it was incorrectly reflected as a "premium" Instead of a "loan."

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[16]For its services, Managed Risk charged Sizemore a $4,000 fee and one percent monthly interest.

5. *The False Statements of Garrison, Kelly & Healthmaster*

(a) *The River Valley Allegations (Counts 11-26)*

The Government contends that Kelly, from 1989 to 1993, through false statements, fraudulently obtained $1,765,492 in Medicare funds, when Healthmaster purchased River Valley, an Albany, Georgia home health care agency, from four Galloway family members. The scheme was structured as follows: for the sale of River Valley, each Galloway was to receive a deposit of $100,000 plus $80,000 (per person) per year for ten years. Healthmaster, however, at Kelly's direction, completed the sales transaction by placing the Galloways on Healthmaster's payroll. They each received semi-monthly checks totaling $80,000, the amount they were due for the River Valley sale, as salary expense to Healthmaster yet they performed no work. Salary expenses were reimbursed by Medicare. There was testimony in the record that Kelly had been warned by a Healthmaster employee that this scheme would constitute Medicare fraud.

(b) *The Concealment of Related Company Managed Risk Allegations (Counts 30-32)*

The Government charges that Kelly and Suba fraudulently concealed their ownership in Managed Risk from Healthmaster employees, although Managed Risk operated on the Augusta premises of Healthmaster, its largest client, and, Healthmaster paid Managed Risk's overhead and travel expenses. In addition, Kelly did not identify Managed Risk as a "related company" on Healthmaster's cost reports for 1991, 1992, or 1993. *See* note 12 *supra*. Kelly, using Managed Risk as middleman, established the Augusta WC account, designed after Healthmaster's existing self-insured health program. *See* Part II C. 2. *supra*. Managed Risk received fees of $101,844 in 1991 and $114,382 in 1992 for managing Healthmaster's

Augusta WC and Augusta II accounts.[17] In the meantime, Kelly and Suba continued to receive their Healthmaster salaries. With Managed Risk posing as their middleman, the Government contends that Kelly and Suba could in essence double-bill Medicare for work they performed for Healthmaster since Managed Risk fees, like their Healthmaster salaries, were reimbursed by Medicare as operating expenses.

III. ISSUE ON APPEAL

The only issue with merit to discuss on appeal is whether there was sufficient evidence to support the convictions.[18] *See* note 1 *supra*.

IV. STANDARD OF REVIEW

Sufficiency of the evidence is a question of law that we review *de novo*. *United States v. Massey*, 89 F.3d 1433, 1438 (11th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 983, 136 L.Ed.2d 865 (1997). The relevant question for a reviewing court, in judging the sufficiency of the evidence, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

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[17]Managed Risk charged Healthmaster an eight percent commission for managing the Augusta WC account. For managing the Augusta II account, Managed Risk received a base fee of $30,000, plus twenty-five percent of savings or minus twenty-five percent of additional costs.

[18]We do not discuss the boat scheme allegations involving bank fraud and money laundering (Counts 131-132). The Government conceded in its brief at page 32 and at oral argument that there was insufficient evidence to support them as to Kelly.

essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). We resolve all reasonable inferences and credibility evaluations in favor of the jury's verdict; we will uphold the jury's verdict if a reasonable fact finder could conclude that the evidence establishes the defendants' guilt beyond a reasonable doubt. *United States v. Starke*, 62 F.3d 1374, 1380 (11th Cir. 1995). The Government need not disprove every hypothesis of innocence, as the jury is free to choose among reasonable constructions of the evidence. *United States v. Waymer*, 55 F.3d 564, 570 (11th Cir. 1995). The evidence may be sufficient even though it is not wholly inconsistent with every conclusion except that of guilt; the jury is free to choose among reasonable constructions of the evidence. *United States v. Zielie*, 734 F.2d 1447, 1458 (11th Cir. 1984).

V. DISCUSSION

A. *The Conspiracy (Count 1)*[19]

Kelly argues that the Government failed to prove a single, wrap-around conspiracy, or, if it proved anything, it proved multiple conspiracies, by impermissibly piling inference upon inference. He bases his argument on three theories: (1) that counsel for the Government conceded this issue when he stated in his closing argument that Suba "wasn't involved in every one of these subsidiary schemes and transactions, and there's no claim that he was;" (2) that Garrison, in her testimony for the Government, provided no evidence of her involvement in a single conspiracy nor gave any evidence implicating either Kelly or Suba in a single conspiracy; and (3) that the Government failed to prove requisite knowledge and criminal intent.

Individually, Suba tries to distance himself from his co-conspirators by claiming that there was no evidence of his involvement in six of the nine objects of the conspiracy listed in the indictment. He argues that his alleged involvement in the Preferred Care scheme (including money laundering) and the non-disclosures of related companies (including Managed Risk) was entirely separate and distinct from the other multiple schemes alleged against Kelly and Garrison.

To sustain a conviction for conspiracy to defraud the United States, the Government must prove the existence of an agreement to achieve an unlawful objective, the defendant's

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[19]This case reminds one of the prisoner who sued the county when he was hurt during his escape because the county left the jail door open. Apparently, viewing Medicare as a cash cow, the temptation for these co-conspirators was just as great.

knowing and voluntary participation in the conspiracy, and the commission of an overt act in furtherance of it. *United States v. Kammer*, 1 F.3d 1161, 1164 (11th Cir. 1993). However, if the proof shows the defendant knew the essential objective of the conspiracy, it does not matter that he did not know all its details or played a minor role in the overall scheme. *United States v. Walker*, 720 F.2d 1527, 1538 (11th Cir. 1983). In addition, "participation in a criminal conspiracy need not be proved by direct evidence; a common purpose or plan may be inferred from a development and collocation of circumstances." *United States v. Khoury*, 901 F.2d 948, 962 (11th Cir. 1990) (*quoting Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942)). The Government need only produce sufficient evidence that the defendants conspired to commit a single object. *See Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); *United States v. Stone*, 9 F.3d 934, 938-939 (11th Cir. 1993). To sustain a conspiracy conviction therefore, we must conclude that a reasonable fact finder could determine that: (1) an agreement existed among two or more persons; (2) that the defendant[s] knew of the general purpose of the agreement; and (3) that the defendant[s] knowingly and voluntarily participated in the agreement. *United States v. Ramsdale*, 61 F.3d 825, 829 (11th Cir. 1995). Variance between allegations and proof is reversible only when the defendant is actually prejudiced. *See United States v. Coy*, 19 F.3d 629, 634 (11th Cir. 1994).

Under these legal principles, the record reflects that the evidence proved an overarching conspiracy to defraud Medicare. A reasonable juror could justifiably find, beyond a reasonable doubt, that the Medicare fraud conspiracy alleged was the Medicare conspiracy proven.[20] The record indicates

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[20]Notwithstanding, the district court gave an appropriate instruction on multiple conspiracies and the jury is presumed to have followed it. *See United States v. Stone*, 9

that the district court instructed the jury to consider the evidence on each offense and each defendant separately. In addition, the evidence amply demonstrates Kelly's involvement in any conspiracy that may have existed. *See Khoury*, 901 F.2d at 962. It matters not that Suba or Managed Risk may not have known all the details of the conspiracy or played a lesser role in the overall scheme. *See Walker*, 720 F.2d at 1538. We conclude that actual prejudice as to Kelly, Suba and Managed Risk is absent; hence reversal on this issue is unwarranted. *See Coy*, 19 F.3d at 634.

B. *The Preferred Care (PCC) Allegations (Counts 36-109)*

1. *Mail Fraud (Counts 36-78)*

Kelly contends that the evidence does not support his Preferred Care mail fraud convictions for three reasons. (1) that he and Suba were "under no duty or obligation" to pay Preferred Care claims with Preferred Care money, hence, no crime was committed; (2) that Preferred Care premiums included $568,000 in other (general liability or commercial) insurance payments, a matter not alleged as mail fraud in the indictment; and (3) that, while conceding that the last twelve premium checks were mailed (Counts 67-78) (Kelly's assistant testified that she mailed them), he disputes evidence that the remaining were mailed earlier (Counts 36-66).

Suba claims that the evidence does not support his Preferred Care mail fraud convictions because he had no fraudulent intent and that Preferred Care, as Garrison's alter ego, was not a "victim" for 15 U.S.C. § 1341 purposes. There was no evidence Suba claims that, as Healthmaster's "risk manager," he knew that Healthmaster's insurance premiums were being reimbursed by Medicare or that he played any part

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F.3d 934, 938-39 (11th Cir. 1993).

in the Medicare reimbursement process itself, as others were responsible for preparing Healthmaster's cost reports submitted to Aetna.[21]

The Government argues that a reasonable juror could find that Kelly, Suba, and Managed Risk used the United States mails to defraud Medicare when Preferred Care mailed checks totaling $1,420,237 Managed Risk's Atlanta post office box. When a Preferred Care employee made a legitimate workers' compensation claim, Kelly and Suba covered up its house of cards, the Government contends, by paying the claim from the Augusta WC fund comprised of Medicare money. Meanwhile, the $1,420,237 was converted and distributed by Suba to himself, Mrs. Kelly and the Garrison children's trusts. If the claims were not paid, the Government argues, the Managed Risk shareholders would not have been able to keep pocketing the Preferred Care premiums and their house of cards would have folded.

The mail fraud statute prohibits devising a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses," which is furthered by use of the mails. 18 U.S.C. § 1341; *see also United States v. Funt*, 896 F.2d 1288, 1292 (11th Cir. 1990). To prove mail fraud, the Government must show that the defendant (1) intentionally participated in a scheme to defraud and (2) used the mails to execute the fraudulent scheme. *See United States v. Hooshmand*, 931 F.2d 725, 731 (11th Cir. 1991). The Government need not produce direct proof of scienter in a mail fraud case, however; circumstantial evidence of criminal intent can suffice. *United*

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[21]There is evidence in the record that Healthmaster's vice-president, Mike Haddle, prepared the cost reports with information supplied by others. Suba claims that "his name never came up" in this context as one of the information suppliers.

States v. Hawkins, 905 F.2d 1489, 1496 (11th Cir. 1990). The Government must establish only that the fraudulent scheme existed; conviction for mail fraud "need not rest on the success of the fraudulent scheme." *United States v. Wingate*, 997 F.2d 1429, 1433 (11th Cir. 1993). Guilty knowledge can rarely be established by direct evidence, especially in respect to fraud crimes which, by their very nature, often yield little in the way of direct proof. *See United States v. DesMarais*, 938 F.2d 347, 352 (1st Cir. 1991).

In this case we conclude that the mails were used and the United States was defrauded at the conclusion of the following sequence of events: (1) Healthmaster (reimbursable) premiums were deposited into the trust fund; (2) Preferred Care (non-reimbursable) premiums were not paid into the trust fund, although Appellants had an apparent fiduciary obligation to do so, but were siphoned off via the mails to Managed Risk shareholders; (3) Preferred Care employees made $225,000 in claims which were paid by the trust; (4) the money in the trust used to pay the non-reimbursable claims was comprised of Medicare reimbursed money. 18 U.S.C. § 1341.

We have examined the record as to the mailing of each of the forty-three checks charged in the indictment. We conclude that direct testimonial evidence of mailing exists as to Counts 67-78, and strong circumstantial evidence of mailing exists as to Counts 36-66. *See Waymer*, 55 F.3d at 570-571. As to Kelly, his arguments that no crime was committed because he had "no duty" to deposit the Preferred Care premiums in the trust find, and, that the Preferred Care premiums contained general liability or commercial insurance are without merit. As to Suba, we find that there is ample circumstantial evidence to support the idea that he knew exactly what was going on. Although he claims he "was only a risk manager for Healthmaster," he also managed and owned part of Managed Risk. Suba knew and participated in using, as Managed Risk's

business address, that of an Atlanta post office, while operating Managed Risk on Healthmaster's Augusta premises. Strong circumstantial evidence is that the Preferred Care checks were addressed to this Atlanta post office box. Suba endorsed and deposited the Preferred Care checks in Atlanta or Marietta banks, other strong circumstantial evidence of mailing. Suba signed the twenty-seven checks distributing Preferred Care money to the Managed Risk shareholders, including a hefty $390,000 profit to himself.[22]

The jury could reasonably infer Suba's guilty knowledge and participation in the scheme to defraud Medicare from the whole of the evidence presented and strong circumstantial evidence that the checks were mailed. Given the widespread nature of the Medicare fraud from these Preferred Care counts and the large amount of extra revenue generated to Suba and Kelly personally, only a conscious course of calculated ignorance could have kept Suba from knowing the truth. In fact, we think that Suba played more than a minor role in this operation. It is clear that he had more understanding of the underlying unlawful act than he cares to admit and that he was a knowing and willing participant in the conspiracy to defraud Medicare through this house of cards.

The same is true for Kelly, who, second only to Garrison, held the reins of corporate control as chief financial officer of Healthmaster and had hands-on involvement in the operation of the business. Our review of the record persuades us that there was sufficient evidence to support both Kelly's and Suba's convictions on these counts. *See United States v. O'Brien*, 14 F.3d 703, 708 (1st Cir. 1994) (where extensive circumstantial evidence "formed a river of proof" supporting

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[22]A substantial dividend rate of return for a shareholder making only a $10,000 investment.

a jury's conviction of an ambulance service owner on 420 counts relating to Medicare fraud).

2. *Money Laundering (Counts 79-109)*

Kelly concedes that the financial transactions alleged in the money laundering counts occurred. He claims that money laundering did not occur because the financial transactions did not involve the proceeds of mail fraud.[23] Suba does not address this issue in his briefs other than in a sentencing context.

The Government contends that a reasonable juror could find that Kelly and Suba laundered the mail fraud Preferred Care premiums by first depositing them in Managed Risk account and then distributing them to its shareholders. Its evidence of Kelly's criminal intent, the Government points to his manipulation of the Garrison children's trust distribution deposits. Kelly forged the trustee's name on the signature card (of an account of which the trustee had no knowledge) and

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[23]Kelly also claims that (1) his financial transactions had no affect upon interstate commerce; and (2) that his conviction for money laundering cannot be upheld because those counts involved more money ($1.7 million) than the mail fraud counts ($1.4 million). Both of these arguments are meritless. First, there is evidence that his transactions had an effect upon interstate commerce. *See* 18 U.S.C. § 1956(c)(6) (defining financial institutions as one specified in 31 U.S.C. § 5312(a)(2), including a wide range of institutions, as the district court instructed the jury). Second, the law in this circuit is clear that "where funds involved in the transaction are derived from a commingled account of which only a part comes from specified unlawful activities,'" money laundering convictions can be upheld. *See United States v. Cancelliere*, 69 F.3d 1116, 1120 (11th Cir. 1995).

then forged the trustee's endorsement on the checks, also without his knowledge or permission. Laundering continued when Suba and Kelly deposited their distributions into their personal bank accounts. Kelly engaged in further money laundering by investing with two brokerage houses and purchasing South Carolina real estate.

In order to prove the crime of money laundering, the Government must prove that Kelly and Suba "conducted ... a financial transaction which in fact involved the proceeds of specified unlawful activity . . . ." *See* 18 U.S.C. § 1956; *United States v. Cancelliere*, 69 F.3d 1116, 1119 (11th Cir. 1995). We think the evidence is clear that a reasonable juror could find that the Government sustained its burden of proving beyond a reasonable doubt that Kelly and Suba laundered the Preferred Care premiums at issue in the mail fraud counts by depositing them into Managed Risk accounts and distributing them to themselves as shareholders. Kelly's unlawful activity went two steps further when he forged the trustee's signature and endorsements and invested the proceeds in securities and real estate. Neither were these money laundering transactions "open and notorious" as Kelly contends. *See United States v. Dobbs*, 63 F.3d 391 (5th Cir. 1995). We find no error regarding this issue.

C. *The Health Insurance Fund Allegations (Counts 112-123, 125-128)*

1. *Mail Fraud (Counts 112-115)*

Kelly contends that the Government failed to prove mail fraud because it failed to prove that he knowingly and willfully embezzled from the Greenville account. He claims that there is no evidence that HDR transferred the funds from the Greenville account to the Augusta II account based his false statement that he could obtain a "better yield" elsewhere,

or that his statement was material in influencing HDR's decision to comply with his request.

The Government argues that mail fraud was committed when Kelly requested that HDR issue four (Medicare-reimbursed) Greenville account checks and mail them to him for deposit in the Augusta II account, creating a $1,587,775 "slush fund." It claims that Kelly's "better yield" statement was relevant because it falsely implied that he planned to use the money to benefit the trust fund when in fact he used it to benefit himself and Master Health.

To prove Kelly violated the mail fraud statute, the Government must show that he intentionally participated in a scheme to defraud and used the United States mails to carry out that scheme or artifice. 18 U.S.C. § 1341; *see Waymer*, 55 F.3d at 568. And, although proof of specific intent to defraud is necessary, *id.*, "circumstantial evidence of criminal intent can suffice." *United States v. Cox*, 995 F.2d 1041, 1045 (11th Cir. 1993). *See also* Part V.B.1 *supra*.

Viewing the evidence in the light most favorable to the Government and resolving all reasonable inferences and credibility evaluations in favor of the jury's verdict, we agree. *See Massey*, 89 F.3d at 1438. The Government need not produce direct proof of scienter in a mail fraud case, circumstantial evidence will suffice. *See Hawkins*, 905 F.2d at 1496. Kelly's false statement constituted circumstantial evidence of criminal intent. *Id.*; *see Cox*, 995 F.2d at 1045. We think the record is clear that a reasonable juror could conclude that Kelly committed mail fraud when he caused the Greenville account Medicare funds to be mailed to and deposited in the Augusta II account.

2. *Embezzlement from an employee benefit plan (Counts 116-121)*

Kelly contends that there is no evidence to prove that he acted willfully or knew that his use of the money in the Augusta II account violated any legal duty. He claims that the embezzlement conviction should be set aside because the Government failed to prove the requisite criminal intent. The Government claims that the evidence easily demonstrated that Kelly embezzled $1,587,775 from the Greenville account, through the Augusta II account, both for his own use and for the benefit of Master Health.

A charge of embezzlement from an employee benefit fund requires that the Government prove that Kelly is a person who "embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use or to the use of another, any moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan . . . ."[24] 18 U.S.C. § 664. Section 664 requires a showing of fraudulent intent to sustain a conviction. *See United States v. Andreen*, 628 F.2d 1236 (9th Cir. 1980). In *United States v. Snyder*, 668 F.2d 686 (2d Cir. 1982), the Second Circuit recognized that "the only real question . . . was whether [the defendant] took [the funds] with the requisite criminal intent." *Id.* at 690.

We conclude that the evidence was sufficient to sustain a conviction for violating section 664 beyond a reasonable doubt. A reasonable jury could have found that Kelly possessed the specific criminal intent necessary to satisfy the

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[24]"The legislative history of Section 664 clearly indicates that its intended purpose was to preserve welfare funds for the protection of those entitled to their benefits." *United States v. Santiago*, 528 F.2d 1130, 1133 (2d Cir. 1976), *citing*, H.R.Rep. No. 87-998 (1961), *reprinted in* 1962 U.S.C.C.A.N. 1532. This important public policy purpose is the underlying momentum for the enactment of section 664. *United States v. Somerstein*, 971 F. Supp. 736, 745 (E.D.N.Y.1997).

statute and that he embezzled Medicare money from an employee benefit plan for his own use and that of Master Health. He used the funds to purchase a $1 million certificate of deposit for Master Health which had been unable to meet Georgia's new capitalization requirements and took three checks ($116,160; $78,400; $71,256) for his own benefit. Kelly's argument that there was no evidence that these funds wouldn't someday be returned to the Augusta II account is without merit. *See United States v. Wuagneux*, 683 F.2d 1343, 1359 (11th Cir. 1982) (citations omitted) (where the possibility that funds will be recovered does not preclude criminal liability). We find no error on this issue.

3. *Money Laundering (Counts 122-123, 125-128)*

Kelly contends that since he should be acquitted on the mail fraud and embezzlement counts, he is therefore entitled to a judgment of acquittal on the money laundering counts. The Government points to the record and to the fact that Kelly did not report the three checks on his income tax return.

In order to prove that Kelly laundered money in connection with the mail fraud and embezzlement counts, the Government is required to show that the property involved in a financial transaction represented proceeds of some form of unlawful activity, 18 U.S.C. § 1956(a)(1); that Kelly conducted or attempted to conduct such financial transaction with the intent to evade income taxes, 18 U.S.C. § 1956(a)(1)(A)(ii); knowing that the transaction was designed in whole or in past to conceal or disguise the nature, location, source, ownership, or control of those proceeds. 18 U.S.C. § 1956(a)(1)(B)(i).

As Kelly did not report these three checks on his income tax return, the jury's conclusion that Kelly laundered these Medicare monies is supported by a reasonable construction of the evidence.

D. *The Sizemore Security Mail Fraud Allegations (Counts 110-111)*

Suba claims that he was not involved in wording the invoice for the $125,000 certificate of deposit for Sizemore Security as an "additional premium" instead of a "loan" but that Kelly's initials and jottings were on the invoice and the request form. Kelly claims that no fraud was proven because the loan was repaid.

The Government claims that the evidence clearly indicates Kelly's intent to defraud when he mailed a "request for $125,000 check"/invoice from the Augusta WC fund to the Trust Company Bank. Trust Company Bank in turn mailed a $125,000 check to Managed Risk and Managed Risk used these funds for its purchase of a $125,000 certificate of deposit for Sizemore Security. Repayment was made only after the investigation was ending, three months before the indictment was issued.

Repayment in the face of litigation does not show a lack of fraudulent intent. *United States v. Sirang*, 70 F.3d 588, 595 (11th Cir. 1995). Trust Company Bank mailed the Augusta WC check comprised of Medicare funds to Managed Risk's Atlanta post office box over which Kelly and Suba had control. The jury was entitled to conclude that Kelly and Suba used the United States mails to manipulate Medicare funds in the Augusta WC account for the benefit of themselves and their company. There is no error on this issue.

E. *The False Statement Allegations--(River Valley (Counts 11-26) and the Concealment of Related Company Managed Risk Allegations (Counts 30-32))*

Kelly contends that the Government failed to prove the essential elements of these counts based upon alleged "false statements" in the cost reports, i.e., treating the money paid to

the Galloways for the purchase of River Valley as a salary expense, and failing to disclose that Healthmaster and Managed Risk were related companies on 1991, 1992, and 1993 cost reports. He bases his contention on the premise that he did not prepare the cost reports and that "it is beyond dispute that the Medicare regulations are a complicated morass of compliance rules."

The Government counters that Kelly, himself, is a certified public accountant, was chief financial officer and second-in-command of Healthmaster and that he was warned by a Healthmaster employee that the River Valley scheme would constitute Medicare fraud because Medicare would in essence be illegally reimbursing Healthmaster for the cost of its purchase of River Valley. In addition, the evidence clearly shows that Kelly concealed the relationship between Healthmaster and Managed Risk by using an Atlanta post office box address and an Atlanta answering service telephone number.

In order to prove that Kelly made false statements in violation of 18 U.S.C. § 1001, the Government need only show that Kelly knowingly and willfully concealed a material fact by any trick, scheme, or device, or made or used a false document knowing that it contained any false, fictitious, or fraudulent statement or entry. 18 U.S.C. § 1001. A reasonable jury could conclude from the substantial evidence presented on these counts that Kelly violated the false statements statute.

VI. CONCLUSION

Based upon the foregoing, the convictions and sentences of Suba and Managed Risk are affirmed. As to Kelly, except as to Counts 131 and 132 which are reversed, his conviction is also affirmed. We remand for Kelly's resentencing on Counts 131 and 132 in accordance with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR RESENTENCING AS TO KELLY.